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## Sweatt v. Painter, the End of Segregation, and the Transformation of Education Law

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# *Sweatt v. Painter*, the End of Segregation, and the Transformation of Education Law

Jonathan L. Entin\*

The Supreme Court's decision in *Brown v. Board of Education*<sup>1</sup> was a watershed event. In that unanimous ruling, the Court repudiated two of its most embarrassing opinions: *Scott v. Sandford*,<sup>2</sup> which suggested that blacks had no rights which whites were bound to respect, and *Plessy v. Ferguson*,<sup>3</sup> which endorsed the "separate but equal" doctrine. *Brown* has rightly been called "probably the most important American governmental act of any kind since the Emancipation Proclamation."<sup>4</sup> This landmark case not only made clear that officially supported racial discrimination violated the Constitution, but it also served as a catalyst for the modern civil rights movement, leading to sweeping changes in American law and society.<sup>5</sup>

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\* Assistant Professor of Law, Case Western Reserve University. I have accumulated numerous personal and intellectual debts in the course of this project. Victor G. Rosenblum encouraged my initial curiosity about the *Sweatt* case. This Article could not have been written without his wise and generous counsel. Judge A. Leon Higginbotham, Jr., of the United States Court of Appeals for the Third Circuit offered his support and assistance to this work at a crucial stage. John T. Hubbell kindly shared his knowledge of the desegregation of the University of Oklahoma with me. The staff of the Case Western Reserve law library, especially Pat Harris, Dan Kowal, and Rosanna Masley, performed herculean feats in response to my never-ending requests for information. My colleagues Melvyn Durchslag and William P. Marshall offered a number of useful suggestions on an earlier draft. I thank all of them for their contributions and absolve each from responsibility for the errors of omission or commission that remain.

1. 347 U.S. 483 (1954).

2. 60 U.S. (19 How.) 393 (1857). The opinion in *Brown* does not mention *Dred Scott*. The result in that case was, of course, effectively overruled by the Civil War and by the thirteenth amendment. Consequently, the Court never was forced to repudiate that decision and had not done so before 1954. Both the result and the reasoning of *Brown*, however, mark a complete rejection of that old case.

3. 163 U.S. 537 (1896).

4. 2 THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY 266 (L. Pollak ed. 1966); see also Pollak, *Thurgood Marshall: Lawyer and Justice*, 40 MD. L. REV. 405, 406 (1981) ("assuredly the most important litigation of any kind in any court since the Civil War").

5. The Court promptly extended *Brown* in a series of per curiam orders to find racial segregation unconstitutional in a variety of other contexts. New Orleans City Park

At the time, however, *Brown* was intensely controversial. Critics denounced the Court for arbitrarily and abruptly overturning *Plessy* on the basis of fuzzy sociological theories rather than legal

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Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (municipal parks); Gayle v. Browder, 352 U.S. 903 (1956) (city buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (municipal golf courses); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955) (public beaches). More significantly, however, much of the constitutional jurisprudence of the past generation, particularly with respect to free speech, has arisen in the context of civil rights activities that took place in the wake of *Brown*. E.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Walker v. City of Birmingham, 388 U.S. 307 (1967); Bond v. Floyd, 385 U.S. 116 (1966); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). See generally H. KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965).

Among the federal statutes that were adopted after *Brown*, and as a result of forces set in motion by that decision, are the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified as amended in scattered sections of 5, 28 & 42 U.S.C. (1982)); the Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960) (codified in scattered sections of 18, 20 & 42 U.S.C. (1982)); the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended in scattered sections of 28 & 42 U.S.C. (1982)); the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-4 (1982)); and the Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (1968) (codified as amended in scattered sections of 18, 25, 28 & 42 U.S.C. (1982)).

In the generation following *Brown*, blacks have made significant progress and gained increased opportunities in education and employment, although substantial racial differentials remain. See generally R. FARLEY, BLACKS AND WHITES: NARROWING THE GAP? (1984); P. BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS 125-54 (1985); D. FEATHERMAN & R. HAUSER, OPPORTUNITY AND CHANGE 313-84 (1978); W. WILSON, THE DECLINING SIGNIFICANCE OF RACE 88-164 (2d ed. 1980).

Moreover, blacks have made important political breakthroughs during the same period. Both the number and the proportion of eligible blacks registered to vote have increased dramatically since the passage of the Voting Rights Act of 1965. S. REP. NO. 417, 97th Cong., 2d Sess. 6, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 183; M. BARONE & G. UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1984, at 639 (1983); O'Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 769-70 (1983). In addition, the number of black elected officials increased from no more than 280 in 1964 to 4,607 in 1979. Eisinger, *Black Employment in Municipal Jobs: The Impact of Black Political Power*, 76 AM. POL. SCI. REV. 380, 380 n.1 (1982). To put the matter in more graphic terms, George Wallace and Strom Thurmond, both of whom came to power as diehard segregationists, actively sought black support in their last campaigns, and neither might have been elected without that support. M. BARONE & G. UJIFUSA, *supra*, at 2, 1062; Chris. Sci. Monitor, Nov. 4, 1982, at 13, col. 1 (midwestern ed.); N.Y. Times, Jan. 18, 1983, at 1, col. 2. Indeed, Wallace issued a formal proclamation on the occasion of the first observance of the birthday of Dr. Martin Luther King, Jr., as a federal holiday and had it read from the very spot from which he had promised to maintain "segregation forever" in his first inaugural speech in 1963. Wash. Post, Jan. 21, 1986, at A1.

principles and for usurping the legislative function of the states.<sup>6</sup> In fact, *Brown* marked the culmination of a carefully planned litigation strategy that was designed to chip away at "separate but equal" one step at a time.<sup>7</sup> The most significant of these preliminary cases was *Sweatt v. Painter*,<sup>8</sup> which effectively outlawed segregated law schools and "extensively undermine[d]"<sup>9</sup> the "separate but equal" doctrine. Yet the critics never mentioned these earlier decisions. Today, when *Brown* seems a settled part of American jurisprudence,<sup>10</sup> those cases have faded from memory. Even in the leading constitutional law casebooks, they are relegated to the status of side notes if they appear at all.<sup>11</sup>

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6. *E.g.*, Declaration of Constitutional Principles, 102 CONG. REC. 4460-61, 4515-16 (1956); R. GORDON, NINE MEN AGAINST AMERICA 79-95 (1958).

The Declaration of Constitutional Principles has come to be referred to as the Southern Manifesto, a joint statement issued by 19 Senators and 77 Representatives on March 12, 1956. The Manifesto denounced *Brown* as "clear abuse of judicial power" and pledged support for "those States which have declared the intention to resist forced integration by any lawful means."

One critic did recognize that some more recent decisions foreshadowed *Brown*, but nevertheless regarded that ruling as having done violence to the Constitution. J. KILPATRICK, THE SOVEREIGN STATES 256-57 (1957).

7. The litigation campaign that culminated in *Brown* is exhaustively chronicled in R. KLUGER, SIMPLE JUSTICE (1975).

8. 339 U.S. 629 (1950).

9. Frank, *The United States Supreme Court: 1949-50*, 18 U. CHI. L. REV. 1, 36 (1950); see also L. MILLER, THE PETITIONERS 340-41 (1966).

10. The strongest critics of judicial activism now recognize the continuing vitality of *Brown*. No serious commentator today suggests that this decision be reconsidered, although some would justify the ruling on grounds other than those advanced by the Court. See, e.g., G. McDOWELL, EQUITY AND THE CONSTITUTION 131-32 (1982); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 14-15 (1971). Attorney General Edwin Meese, who argues for a constitutional jurisprudence based firmly upon the framers' intent and who has repeatedly condemned much of the work of the modern Supreme Court as "chameleon jurisprudence," supports *Brown*. He cites the *Plessy* decision as a prime example of the serious errors that flow from ignoring original intent. See, e.g., Meese, *Construing the Constitution*, 19 U.C.D. L. REV. 22, 27 (1985). And Raoul Berger, who has devoted much of the past decade to arguing that the framers of the fourteenth amendment did not intend to abolish segregation in education, repeatedly emphasizes that he supports the result in *Brown*; he claims to oppose only the propriety of judicial resolution of the controversy. R. BERGER, GOVERNMENT BY JUDICIARY 4, 8, 117, 327, 342 (1977).

Even those who regarded *Brown* as wrong on the merits seem reconciled to the decision as an enduring part of the legal landscape. For example, James J. Kilpatrick, the editor of the editorial page of the Richmond News Leader when the case was decided, served as the intellectual architect of Massive Resistance. See J. KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION (1956). Today he offers "no apologies" for his role. Wash. Post, Sept. 19, 1982, at A1. Nevertheless, Kilpatrick has long since given up the fight to overturn the ruling.

11. *Sweatt* is discussed in a footnote in the two most widely used casebooks. See G.



The obscurity into which *Sweatt* has fallen is unfortunate for several reasons. First, the decision was the result of extraordinary professional work by a team of outstanding lawyers. This Symposium is an overdue occasion for recognizing their superior efforts. Second, the Supreme Court's opinion relied heavily upon an excellent amicus curiae brief submitted by nearly 200 law professors. Examination of that brief may yield insight into the influence of nonparties in constitutional litigation. Third, the rulings in *Sweatt* and its companion cases<sup>12</sup> set the stage for *Brown*. *Sweatt*'s attorneys and that influential amicus brief first presented virtually all of the arguments that, in somewhat refined form, would prove decisive in the school segregation decision. As a result, the Court resolved the case in a way that made the ruling in *Brown* much easier than it otherwise would have been. Finally, *Sweatt* had implications beyond the equal protection context: it marked the first time that the Court looked beyond the form to the substance of education. In this sense, the decision provided a basis for more exacting judicial scrutiny of the academic environment.

This Article will analyze these aspects of the *Sweatt* case. Part I describes the facts leading to the litigation. Part II examines the Supreme Court precedents facing *Sweatt*'s attorneys, both in the area of school segregation and in the field of education generally. This section concludes that the Court at best seemed prepared only to enforce the *Plessy* doctrine, and none too rigorously at that. Part III focuses upon the process of making the record at the trial. This section demonstrates how *Sweatt*'s counsel took advantage of ambiguities in the prior cases to lead the Court to

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GUNTHER, CONSTITUTIONAL LAW 636 n.6 (11th ed. 1985); W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 1268 n.b (5th ed. 1980). The case is the subject of a textual note in others. See, e.g., J. BARRON & C. DIENES, CONSTITUTIONAL LAW: PRINCIPLES AND POLICY 510 (2d ed. 1982); P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 406-07 (2d ed. 1983). Still others do not separately discuss *Sweatt* at all. See, e.g., E. BARRETT & W. COHEN, CASES AND MATERIALS ON CONSTITUTIONAL LAW (7th ed. 1985); R. ROTUNDA, MODERN CONSTITUTIONAL LAW: CASES AND NOTES (2d ed. 1985).

*Sweatt* has fared somewhat better in the treatises. One leading reference work devotes a detailed paragraph to the case. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 631 (2d ed. 1983). Professor Tribe, on the other hand, discusses it in a footnote. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1020 n.6 (1978).

12. *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Henderson v. United States*, 339 U.S. 816 (1950).

address the realities of segregated education. Part IV analyzes the proceedings in the Supreme Court and the ultimate decision in the case. This section examines the factors which may have led the Court to rule as it did, including the record made by Sweatt's attorneys, the law professors' amicus brief, the cumulative impact of the companion cases, the position of the Truman administration, and larger societal developments. Finally, part V briefly explores the effects and implications of the *Sweatt* decision for related legal issues.

## I. The Road to Court

On February 26, 1946, Heman Marion Sweatt, a black postal worker with "a yen to become a lawyer,"<sup>13</sup> applied for admission to The University of Texas School of Law.<sup>14</sup> Since the state constitution required racial segregation in education,<sup>15</sup> University President Theophilus Shickel Painter explained that Sweatt could not be enrolled.<sup>16</sup> Painter's letter rejecting Sweatt's application informed him that, as an alternative, the state would provide him with the opportunity to pursue his studies by creating a "colored" law school.<sup>17</sup> Sweatt declined this offer. Instead, represented by a team of NAACP attorneys headed by Thurgood Marshall,<sup>18</sup> he filed suit to compel The University of Texas to admit him.

From the beginning, Heman Sweatt's attempt to break the

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13. L. MILLER, *supra* note 9, at 338. At the time, there were only 23 black lawyers in Texas, although the state had a black population exceeding 800,000. R. KLUGER, *supra* note 7, at 260.

14. *Sweatt v. Painter*, 210 S.W.2d 442, 443 (Tex. Civ. App.—Austin 1948, writ *ref'd*), *rev'd*, 339 U.S. 629 (1950).

15. "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both." TEX. CONST. art. 7, § 7 (repealed 1969).

16. For further discussion of Heman Sweatt's background, see *infra* notes 19-22 and accompanying text.

Theophilus Shickel Painter was a highly respected cytogeneticist who had first reported the widely accepted—but erroneous—finding that the human cell contained 48 chromosomes. Painter's 1921 research was consistently replicated until 1955, when two Swedish researchers, applying recently developed techniques, discovered that the correct number of chromosomes was 46. D. KEVLES, IN THE NAME OF EUGENICS 238-41 (1985).

17. Tushnet, *Thurgood Marshall as a Lawyer: The Campaign Against School Segregation, 1946-1950*, 40 MD. L. REV. 411, 427 (1981).

18. Sweatt was initially represented by W.J. Durham of Dallas. Durham was a cooperating attorney for the NAACP. He in turn involved the national legal staff of the organization. Marshall was the NAACP's chief counsel.

color bar at The University of Texas raised questions. There was, first, the matter of his academic qualifications. In one sense, those were entirely in order: he had graduated with honors from Wiley College.<sup>19</sup> In another, they were not: that all-black institution was unaccredited. This fact offered the University a convenient nonracial basis for refusing to enroll him.<sup>20</sup> There was also the question of his motive for applying. Although he was a man of "sterling character,"<sup>21</sup> some people wondered "whether [he] earnestly desired to study law."<sup>22</sup>

Long before Sweatt applied to the Texas law school, the issue of higher education for blacks had been a matter of public controversy in the state. While the state constitution authorized the establishment of "a College or Branch University" for blacks,<sup>23</sup> that provision had not been implemented when Sweatt applied to The University of Texas.<sup>24</sup> A year earlier, however, the state legislature had enacted a statute providing for the establishment, "[w]henever there is any demand for same," of black-only professional programs that were "substantially equivalent to those offered at the University of Texas."<sup>25</sup> Since no black law school

19. O. JOHNSON, *PRICE OF FREEDOM* 2 (1954).

20. Tushnet, *supra* note 17, at 427. The state never cited Wiley College's lack of accreditation as a basis for denying Sweatt's application. The explanation for this apparent oversight is not entirely clear, but it may be that The University of Texas previously had accepted white graduates of unaccredited institutions. If so, this reason for rejecting Sweatt would have been exposed rather easily as entirely pretextual. Cf. C. TRILIN, *AN EDUCATION IN GEORGIA* 38 (1964) (attorneys for highly qualified black applicant to University of Georgia who had been rejected solely on basis of preadmission interview showed that many white students were interviewed only after they had enrolled). The president of the University of Oklahoma chose not to rely upon the lack of accreditation of the undergraduate college of the first black applicant to the law school precisely because the university had accepted white transfer students from unaccredited institutions. G. CROSS, *BLACKS IN WHITE COLLEGES* 39 (1975).

21. O. JOHNSON, *supra* note 19, at 2, 27.

22. *Id.* at 2. At trial, the state asked Sweatt numerous questions suggesting that the NAACP had put him up to refusing to attend any all-black law school and to demanding admission to The University of Texas. *E.g.*, Record at 174, 176, 177-78, 180, 182-83, 184-86, *Sweatt v. Painter*, 339 U.S. 629 (1950) [hereinafter cited as Record].

23. TEX. CONST. art. 7, § 14.

24. See Hornsby, *The "Colored Branch University" Issue in Texas—Prelude to Sweatt vs. Painter*, 61 J. NEGRO HIST. 51, 55-58 (1976).

25. Act of June 1, 1945, ch. 308, 1945 Tex. Gen. Laws 506 (repealed 1947). This statute changed the name of Prairie View State Normal and Industrial College for Negroes to Prairie View University. Section 2, which permitted the creation of black-only professional curricula at the institution provided:

Whenever there is any demand for same, the Board of Directors of the Agricultural and Mechanical College, in addition to the courses of study now

existed at the time, the trial court continued the case for six months to give the state a chance to establish one.<sup>26</sup>

In response, the state Board of Regents authorized the creation of a law school for blacks as part of Prairie View University.<sup>27</sup> Two black lawyers were hired as part-time instructors for the institution, which consisted of a pair of rented rooms in Houston.<sup>28</sup> When the proceedings resumed, the trial judge held that these actions satisfied the constitutional mandate of separate but equal facilities.<sup>29</sup>

While Sweatt's appeal was pending, however, the legislature repealed the earlier statute under which the Prairie View law school had been authorized. It was replaced by a law creating the Texas State University for Negroes.<sup>30</sup> This was to be "a university of the first class"<sup>31</sup> that would offer a wide range of courses, "all of which [were to] be equivalent to those offered at The University of Texas."<sup>32</sup> The new university was to be located in

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authorized for said institution, is authorized to provide for the establishment of courses in law, medicine, engineering, pharmacy, journalism, or any other generally recognized college course taught at the University of Texas, in said Prairie View University, which courses shall be substantially equivalent to those offered at the University of Texas.

26. *Sweatt v. Painter*, No. 74,945 (126th Dist. Ct., Travis County, Tex., June 26, 1946); 210 S.W.2d at 446.

27. Minute Order No. 203-46, Board of Directors, Agricultural and Mechanical College of Texas, Dec. 4, 1946; 210 S.W.2d at 446.

28. R. KLUGER, *supra* note 7, at 261; Tushnet, *supra* note 17, at 428.

29. *Sweatt v. Painter*, No. 74,945 (126th Dist. Ct., Travis County, Tex., Dec. 17, 1946); 210 S.W.2d at 446.

30. Act of March 3, 1947, ch. 29, 1947 Tex. Gen. Laws 36; 210 S.W.2d at 446-47.

The new university may have been created because the state recognized the frailty of its legal position. Tushnet, *supra* note 17, at 428. Prairie View, of which the original black law school was to be a part, was a weak institution that counted such vocational courses as mattress-making and broom-making toward the bachelor's degree. R. KLUGER, *supra* note 7, at 261. Whatever the explanation, Governor Beauford Jester proposed to create Texas State shortly after his inauguration in January 1947. Previous proposals to establish a full-fledged university for blacks had foundered on a state constitutional prohibition on the use of general revenues for the purpose. This obstacle was surmounted because the state had accumulated a \$120 million surplus that was available to fund the new institution. See O. JOHNSON, *supra* note 19, at 7; Hornsby, *supra* note 24, at 59.

31. Act of March 3, 1947, *supra* note 30, § 1.

32. *Id.* § 2. This section provided in relevant part:

The Texas State University for Negroes shall offer all other courses of higher learning, including, but without limitation, (other than as to those professional courses designated for The Prairie View Agricultural and Mechanical College), arts and sciences, literature, law, medicine, pharmacy, dentistry, journalism, education, and other professional courses, all of which shall be equivalent to those offered at The University of Texas. Upon demand being made by any

Houston, but until it began operations there, a temporary law school would open in Austin.<sup>33</sup> These developments prompted the Texas Court of Civil Appeals to vacate the trial court's judgment and remand the case for further proceedings.<sup>34</sup>

## II. The Legal Background

An appreciation of the early procedural maneuvers requires some understanding of the law of race relations as well as an overview of the law of education as both had evolved through the end of World War II. Although the interest of the national government in education antedates the adoption of the Constitution,<sup>35</sup> the Supreme Court had little occasion to consider the subject before *Sweatt*. Most of the cases involving schools and colleges in fact presented standard questions of the law of contract,<sup>36</sup> the rules of descent,<sup>37</sup> or the extent of state regulatory powers.<sup>38</sup> The few decisions which focused upon the educational

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qualified applicant for any present or future course of instruction offered at The University of Texas, or its branches, such course shall be established or added to the curriculum of the appropriate division of the schools hereby established in order that the separate universities for Negroes shall at all times offer equal educational opportunities and training as that available to other persons of this state.

33. *Id.* § 11; 210 S.W.2d at 446-47.

34. *Sweatt v. Painter*, No. 9619 (Tex. Civ. App.—Austin, Mar. 26, 1947); 210 S.W.2d at 446.

35. For example, the Northwest Ordinance provided: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ordinance of July 13, 1787, art. III, 32 J. CONT. CONG. 334, 340-41 (R. Hill ed. 1936). For discussion of the background and implementation of this language, see *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 177-79 (1855). *Cf.* *Engel v. Vitale*, 370 U.S. 421, 443 n.9 (1962) (Douglas, J., concurring) (religion no longer a function of public schools).

36. *E.g.*, *Indiana ex. rel. Anderson v. Brand*, 303 U.S. 95 (1938) (tenure); *Dodge v. Board of Educ.*, 302 U.S. 74, 79-80 (1938) (pension rights of teachers); *City of New Orleans v. Fisher*, 180 U.S. 185 (1899) (use of tax funds for payment of judgment creditor); *Bryan v. Board of Educ.*, 151 U.S. 639 (1894) (interpretation of college charter provision); *Atchison Bd. of Educ. v. DeKay*, 148 U.S. 591 (1893) (validity of school bonds); *Doon Township v. Cummins*, 142 U.S. 366 (1892) (same); *McGahey v. Virginia*, 135 U.S. 662 (1890) (same); *The Pennsylvania College Cases*, 80 U.S. (13 Wall.) 190 (1871) (interpretation of college charter provision).

37. *E.g.*, *Cornell Univ. v. Fiske*, 136 U.S. 152 (1890) (validity of bequest); *McDonogh's Ex'rs v. Murdoch*, 56 U.S. (15 How.) 367 (1853) (will contest).

38. *E.g.*, *Zucht v. King*, 260 U.S. 174 (1922) (pupil vaccination requirement); *Waugh v. Board of Trustees*, 237 U.S. 589 (1915) (regulation banning fraternities from state university); *Wyoming v. Irvine*, 206 U.S. 278 (1907) (control of federal land grant funds); *Kies v. Lowrey*, 199 U.S. 233 (1905) (alteration of school district boundaries); *Buchanan v. City of Litchfield*, 102 U.S. 278 (1880) (school district bonding limits); *Da-*

process suggested that the Justices would apply minimum scrutiny unless some favored value were at stake. The Court had given scant indication that it regarded genuine racial equality as such a value.

### *The Segregation Cases*

1. *Deference to state policy.*—The “separate but equal” doctrine had its origin in a transportation suit, but it quickly spread to the field of education.<sup>39</sup> In *Plessy v. Ferguson*,<sup>40</sup> the Court upheld a Louisiana statute that required segregated railway carriages against a challenge by a black plaintiff.<sup>41</sup> After summarily dismissing his thirteenth amendment claim,<sup>42</sup> the majority found no violation of the fourteenth amendment.<sup>43</sup> Justice Brown emphasized that the Constitution sought to establish political, as opposed to social, equality.<sup>44</sup> Therefore, laws providing for racial segregation did not necessarily imply the inferiority of one group to another.<sup>45</sup> As he explained for the Court:

We consider the underlying fallacy of the plaintiff's argument

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*W. v. Indiana*, 94 U.S. 792 (1876) (apportionment of school funds); *Springfield Township v. Quick*, 63 U.S. (22 How.) 56 (1859) (same); *Board of Trustees v. Indiana*, 55 U.S. (14 How.) 268 (1852) (control of college); see also *Hopkins v. Clemson Agric. College*, 1 U.S. 636 (1911) (tort liability); *infra* notes 120-179 and accompanying text.

39. *Brown v. Board of Educ.*, 347 U.S. 483, 491 & n.6 (1954). Segregated schools apparently were approved judicially for the first time in a Massachusetts case in which Charles Sumner represented the unsuccessful black plaintiff. *Roberts v. City of Boston*, Mass. (5 Cush.) 198, 206 (1849). The state legislature thereafter prohibited separate schools. Ch. 256, 1855 Mass. Acts 674. For discussion of the voluminous litigation concerning the constitutionality and equality of such separate schools in state and lower federal courts, see D. BELL, *RACE, RACISM, AND AMERICAN LAW* 368-71 (2d ed. 1980); Carson, *The New Law of Race Relations*, 1969 WIS. L. REV. 470, 482 n.27; Leflar & Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 430-35 (1954).

40. 163 U.S. 537 (1896).

41. Homer Plessy, the plaintiff, claimed that he was only one-eighth black and that he could pass for white, *id.* at 541, but did not argue that the state law should not apply to him on that account.

42. *Id.* at 542-43. The Court found the lack of conflict between the statute and the fourteenth amendment “too clear for argument.” *Id.* at 542.

43. *Id.* at 552.

44. *Id.* Perhaps to defuse suggestions that *Plessy* was a product of peculiarly Southern attitudes and experiences, defenders of the decision have taken pains to point out that Justice Henry Billings Brown, the author of the majority opinion, was born and bred in the West. Thus, in *Sweatt*, the state appellate court observed that Justice Brown was a native of Massachusetts who was educated at Yale and Harvard, and who practiced and served as a state and federal judge in Michigan before his appointment to the Court. 13 S.W.2d at 444 n.2.

45. 163 U.S. at 544.

to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.<sup>46</sup>

In support of this proposition, he pointed to "the establishment of separate schools for white and colored children, which ha[d] been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced."<sup>47</sup> The only limitation on the exercise of this power was that of reasonableness, and Louisiana had not contravened that limitation.<sup>48</sup>

The first Justice Harlan, in a celebrated and solitary dissent, viewed the state's arguments as disingenuous.<sup>49</sup> He pointedly observed:

Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary.<sup>50</sup>

Then, in one of the most famous sentences in American jurisprudence, he concluded: "Our Constitution is color-blind, and

46. *Id.* at 551.

47. *Id.* at 544. In support of this statement, the Court cited *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198 (1849), but failed to note that the state legislature had enacted a statute soon afterward that effectively overturned that decision. *See supra* note 39. The Court also noted that Congress had provided for separate schools in the District of Columbia. 163 U.S. at 545.

48. 163 U.S. at 550. This limitation would prevent states from requiring separate streetcars for persons with hair of a certain color or for aliens or individuals of a particular national origin, and from enacting laws prescribing that blacks and whites walk on opposite sides of the street or live in houses or operate vehicles of different colors. *Id.* at 549-50. The plaintiff had argued that none of these regulations would conflict with the logic of "separate but equal." *Id.* at 549.

49. *Id.* at 552-64 (Harlan, J., dissenting). While defenders of segregation emphasize Justice Brown's Northern background, *see supra* note 44, most people overlook Justice Harlan's history as a slaveholder and opponent of federal efforts to protect the rights of blacks, including the Emancipation Proclamation, the Reconstruction amendments to the Constitution, and Reconstruction civil rights statutes. *See generally* Westin, *John Marshall Harlan and the Constitutional Rights of Negroes: The Transformation of a Southerner*, 66 YALE L.J. 637, 638-54 (1957).

50. 163 U.S. at 557 (Harlan, J., dissenting).

neither knows nor tolerates classes among citizens."<sup>51</sup>

Nevertheless, only three years later he wrote the unanimous opinion in *Cumming v. Richmond County Board of Education*,<sup>52</sup> a decision which appeared implicitly to approve the operation of segregated schools. In that case, a group of black parents and taxpayers challenged the closing of the one high school in their county open to black children while high schools available only to whites continued to operate.<sup>53</sup> The board argued that it lacked the funds to provide both primary and secondary schools for blacks and that it could better fulfill the educational needs of the black population by training the larger number of elementary school pupils instead of the smaller group of high schoolers.<sup>54</sup>

At oral argument the plaintiffs explicitly challenged the constitutionality of separate schools. The Court, however, refused to consider that argument because it had not been raised in the pleadings.<sup>55</sup> Justice Harlan went on to point out that the aggrieved blacks could not benefit from the relief they were seeking, since an injunction would close the white high school rather than compel the board to maintain a black institution.<sup>56</sup> The record contained no evidence that the board of education intentionally discriminated against the black children.<sup>57</sup> In the absence of a "clear and unmistakable disregard" of federally protected rights, education was exclusively a matter of state concern.<sup>58</sup> Hence, black high school students had no enforceable right to attend a public school, and black parents could be compelled to

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51. *Id.* at 559.

52. 175 U.S. 528 (1899).

53. *Id.* at 530-31.

54. *Id.* at 532-33. The board noted the availability of private schools open to blacks at no greater cost to them than a public school. *Id.* at 534-35, 544.

55. *Id.* at 543.

56. *Id.* at 544.

57. *Id.*; cf. *Washington v. Davis*, 426 U.S. 229, 239-48 (1976) (showing of discriminatory intent or invidious motivation required to establish violation of equal protection clause).

The *Cumming* Court noted that "different questions might have arisen" had the plaintiffs sought to compel the board to operate a black high school and the board refused out of racial bias to do so. 175 U.S. at 545. In fact, the plaintiffs had prayed for "such other and further relief as [is] equitable and just," *id.* at 531, a prayer that might have supported such an order.

58. *Id.* at 545. But see *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting) (suggesting racial superiority of whites, at least as to wealth, prestige, achievement, and power). This latter statement at least raises the possibility that the Court failed to examine alternative forms of relief out of its own racial prejudice.



pay taxes to support a system from which their children were excluded.

Less than a decade later, in *Berea College v. Kentucky*,<sup>59</sup> the Court upheld a state law which imposed criminal penalties upon parties who conducted racially mixed classes.<sup>60</sup> Although the statute applied to individuals and associations as well as corporations, the majority held it severable and found no impropriety insofar as it affected the college as a state-chartered corporation.<sup>61</sup> Since Kentucky had reserved an explicit right of amendment when it issued the college's charter and the segregation requirement did not prevent Berea from carrying out its educational purposes,<sup>62</sup> the decision rested upon an adequate state ground.<sup>63</sup> The Court implied, however, that proceedings against an individual might raise federal constitutional issues not present in this suit.<sup>64</sup>

Once again, Justice Harlan dissented. On the procedural side, he maintained that the statute was not severable. It was apparent that the state sought to forbid racially mixed instruction no matter who conducted the class; restricting the prohibition to

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59. 211 U.S. 45 (1908).

60. *Id.* at 58. For the full text of the statute, see *id.* at 59 (Harlan, J., dissenting).

61. *Id.* at 54-55.

62. *Id.* at 56-57. On the significance of the state's reservation of an explicit right to amend the charter, see *infra* note 130 and accompanying text. The state court had found that the college could teach persons of different races at different times or in different places. Therefore, the institution still could carry out its mission. 211 U.S. at 57.

63. 211 U.S. at 54, 58.

64. *Id.* at 54. However objectionable the result in this case may seem to the contemporary mind, it is sobering to contemplate that the decision could have had much uglier implications. The opinion of the Kentucky Court of Appeals rested on the proposition that blacks were a lower order of species. The state court emphasized the overriding importance of maintaining "the purity of racial blood" and paid homage to "[t]he natural law which forbids [racial] intermarriage, and that social amalgamation which leads to a corruption of the races . . . . From social amalgamation it is but a step to illicit intercourse, and but another to intermarriage." *Berea College v. Commonwealth*, 123 Ky. 209, 225-26, 94 S.W. 623, 628 (1906).

The Supreme Court must have made a conscious decision to avoid this basis for upholding the state law. These racist arguments were plainly before it. Kentucky Attorney General James Breathitt devoted several pages of his brief urging the Court to take judicial notice of a series of scientific studies of cranial and genetic differences that purported to support the state's position. Brief for Defendant in Error at 4, 38-42, *Berea College v. Kentucky*, 211 U.S. 45 (1908). For contrasting analyses of these arguments, see A. BICKEL & B. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-21, at 731 n.10 (1984); Hovenkamp, *Social Science and Desegregation Before Brown*, 1985 DUKE L.J. 624, 631-37.

corporations defied common sense.<sup>65</sup> On the merits, he insisted that the state could not bar racially mixed instruction.<sup>66</sup> He limited his position to state regulation of private schools, however, explicitly reserving the question of the legitimacy of segregated public education.<sup>67</sup>

By the time of *Gong Lum v. Rice*,<sup>68</sup> the validity of school segregation seemed unquestioned. In that case, an American child of Chinese descent was barred from attending the local white high school because officials had classified her as colored.<sup>69</sup> Chief Justice Taft, for a unanimous Court,<sup>70</sup> peremptorily rejected her equal protection challenge, noting that many cases had permitted states to operate separate schools without federal intervention. That those decisions had involved black plaintiffs was immaterial; Orientals could be classified as nonwhite.<sup>71</sup>

There were three bright spots in this otherwise dismal picture. In *McCabe v. Atchison, Topeka & Santa Fe Railway*,<sup>72</sup> the Court suggested that a statute authorizing railroads to provide luxury cars for whites but not for blacks was unconstitutional. By implication, "separate but equal" required at least some form of "separate" provision for blacks; whatever the criterion of equality, nothing could not be equivalent to something. This observation was pregnant with significance, for it represented "a challenge to the entire structure of Jim Crow law built up since the [end of

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65. 211 U.S. at 61-65 (Harlan, J., dissenting).

66. *Id.* at 67-68.

67. *Id.* at 69.

68. 275 U.S. 78 (1927).

69. *Id.* at 80, 82.

70. The Court included Justices Holmes, Brandeis, and Stone, who are widely viewed as among the most liberal members to have served up to that time. Stone, of course, wrote the famous footnote 4 in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), the leading text for judicial protection of minority rights. See Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289-97 (1982). Holmes, however, was notably unsympathetic to racial equality claims. For example, he joined the majority opinion in *Berea College* and in a number of decisions upholding state laws requiring segregation in transportation. He dissented in *Bailey v. Alabama*, 219 U.S. 219 (1911), an important thirteenth amendment case, after having written the opinion for the Court disposing of the controversy at an earlier stage on procedural grounds. *Bailey v. Alabama*, 211 U.S. 452 (1908). See generally Rogat, *Mr. Justice Holmes: A Dissenting Opinion* (pt. 2), 15 STAN. L. REV. 254, 255-75 (1963).

71. 275 U.S. at 85-87. The Chief Justice discussed *Cumming*, *Plessy*, and *Roberts*, and cited more than a dozen other state and federal cases. *Id.*

72. 235 U.S. 151 (1914).

Reconstruction]."<sup>73</sup> In *Buchanan v. Warley*,<sup>74</sup> the Court unanimously invalidated a municipal ordinance that prohibited any person from moving into any house located in any block in which a majority of houses were occupied by members of another race.<sup>75</sup> And in *Guinn v. United States*,<sup>76</sup> all of the participating Justices joined an opinion striking down under the fifteenth amendment an Oklahoma grandfather clause limiting the franchise to persons eligible to vote on January 1, 1866, and their lineal descendants, thereby effectively barring blacks from voting.<sup>77</sup>

These were mixed blessings, however. The Court upheld the statute at issue in *McCabe* because the plaintiffs lacked standing to sue.<sup>78</sup> The opinion in *Buchanan* seemed more concerned that the ordinance interfered with private property rights than that it promoted racial segregation with a vengeance.<sup>79</sup> And the rejection of the grandfather clause in *Guinn* did not prevent the use of poll taxes, literacy tests, white primaries, and other devices that effectively prevented blacks, for decades to come, from voting.<sup>80</sup> Moreover, nothing in these decisions questioned the continued vitality of *Plessy*.<sup>81</sup> Thus, segregation for all practical purposes appeared immune from constitutional attack.

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73. A. BICKEL & B. SCHMIDT, JR., *supra* note 64, at 783.

74. 245 U.S. 60 (1917).

75. *Id.* at 70, 82.

76. 238 U.S. 347 (1915). Ironically, the proposition that this device discriminated against blacks was argued by Solicitor General John W. Davis, who would close his career before the Supreme Court nearly 40 years later as the chief advocate for school segregation in *Brown*.

77. On the same day that *Guinn* was decided, the Court struck down a similar grandfather clause that defined the right to vote in municipal elections in Annapolis, Maryland. *Myers v. Anderson*, 238 U.S. 368, 382-83 (1915).

78. 235 U.S. at 163-64.

79. This is the conventional reading of the decision. For a suggestion that *Buchanan* might be read, at least in part, as upholding the civil rights of blacks as well as traditional property rights, see A. BICKEL & B. SCHMIDT, JR., *supra* note 64, at 813-17.

80. Oklahoma managed to blunt the impact of *Guinn* by quickly passing a new statute giving those persons who had been disenfranchised by the grandfather clause only twelve days to register to vote or be forever barred. This provision ultimately was invalidated in *Lane v. Wilson*, 307 U.S. 268, 270, 277 (1939).

81. Indeed, the Court in *McCabe* appeared to reaffirm *Plessy*. The appearance may have been deceiving, however. Justice Hughes' only reference to that precedent came in a sentence observing that "there is no reason to doubt the correctness" of the conclusion of the lower court that "separate but equal" comported with the fourteenth amendment. 235 U.S. at 160.

2. *Enforcing "separate but equal."*—Careful examination of the segregation precedents suggested two possible challenges to the "separate but equal" doctrine. First, in practice, "separate" was never "equal." No state-supported black college offered any form of graduate or professional training.<sup>82</sup> Even worse, a 1929 study by the NAACP revealed that segregated public school districts typically spent up to ten times as much on a white child's education as they did on a black child's instruction.<sup>83</sup> Thus, a series of suits designed to force equality of the separate educational institutions might be pressed. If they succeeded, substantial improvements in black education would result. Indeed, the cost of equalizing black schools might persuade many jurisdictions to abandon segregation altogether.

Second, a close reading of the precedents suggested that the Supreme Court never had squarely upheld the constitutionality of segregation in education.<sup>84</sup> In *Cumming*, the plaintiffs had made a fatal procedural error. They pressed the constitutional issue for the first time at oral argument in the Supreme Court. For that reason, the Court refused to address this fundamental question.<sup>85</sup> Nor had *Gong Lum* involved a challenge to the validity of racial classifications in education. The student in that case claimed that, as Justice Harlan had observed in *Plessy*, segregation laws were designed to isolate blacks from the rest of the population. Since whites sought to insulate themselves from the harms alleged to flow from contact with blacks, Chinese-Americans were entitled to the same protection. Thus, she conceded the validity of racial classifications; she merely contested the legality

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82. Except for Howard University and Meharry Medical College, neither of which was state-operated, no black college had any kind of graduate or professional program for blacks. R. KLUGER, *supra* note 7, at 136.

83. A subsequent analysis prepared for the NAACP pointed out:

The study financed by the American Fund for Public Service made by the N.A.A.C.P. revealed that in South Carolina more than ten times as much was expended for the education of white children as for Negro children; that in Florida, Georgia, Mississippi and Alabama, more than five times as much; in North Carolina, Virginia, Texas, Oklahoma and Maryland, more than twice as much.

N. Margold, *Preliminary Report to the Joint Committee Supervising the Expenditure of the 1930 Appropriation by the American Fund for Public Service to the NAACP*, reprinted in part in J. GREENBERG, *CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION* 50 (1977).

84. See *id.* at 50-57 (reprinting excerpts of Margold Report); see also R. KLUGER, *supra* note 7, at 133-37.

85. See *supra* text accompanying note 55.

of the administrative determination that she was not "white" for purposes of school attendance.<sup>86</sup>

Accordingly, the NAACP determined to contest the constitutionality of segregation one step at a time. The ultimate goal was to have *Plessy* overruled, but the organization realized that it could not achieve that result all at once. Therefore, it began by taking that case literally: if segregation were the law, then the separate facilities must be truly equal. The campaign began at the graduate and professional level, where the absence of such programs in the segregating states held out the prospect of relatively easy victories. At the outset, the question of what might constitute victory seemed less important than simply improving educational opportunities. And, it turned out, all of the leading litigation in this phase involved law schools, perhaps because of the importance of attorneys to the movement for racial equality.<sup>87</sup>

The first breakthrough came in Maryland, where the state courts ordered Donald Murray admitted to the state's only law school.<sup>88</sup> The plaintiff, an alumnus of Amherst College, was barred from the law school at the University of Maryland solely on racial grounds.<sup>89</sup> Instead of allowing blacks to attend the university, Maryland provided scholarships for them to pursue their legal studies outside the state.<sup>90</sup> The Maryland Court of Appeals concluded that this system failed to provide substantial equality

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86. The following passage captures the essence of the student's argument:

If there is danger in the association [with blacks], it is a danger from which one race is entitled to protection just the same as another. The White race may not legally expose the Yellow race to a danger that the dominant race recognizes and, by the same laws, guards itself against.

Brief for Plaintiff in Error at 10, *Gong Lum v. Rice*, 275 U.S. 78 (1927). For the full argument, see *id.* at 8-19.

87. See Houston, *The Need for Negro Lawyers*, 4 J. NEGRO EDUC. 49 (1935). Charles Hamilton Houston was the first legal director of the NAACP and later became dean of the law school at Howard University. His students at Howard included Thurgood Marshall, Spottswood Robinson, Robert Carter, and several others who litigated the most significant segregation cases before and after *Brown*. See R. KLUGER, *supra* note 7, at 125-31, 147-56, 159-66, 179-80, 186-205. See generally G. McNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983). Marshall, of course, now serves as Associate Justice of the Supreme Court; Robinson is chief judge of the United States Court of Appeals for the District of Columbia Circuit; Carter is a member of the United States District Court for the Southern District of New York.

88. *Pearson v. Murray*, 169 Md. 478, 489, 182 A. 590, 594 (1936).

89. *Id.* at 480, 182 A. at 590.

90. *Id.* at 485-86, 182 A. at 593.

since there was no assurance that any particular applicant, regardless of qualifications, would receive a scholarship, the aid did not cover additional housing, travel, or incidental expenses, and the plaintiff could not study Maryland law although he planned to practice in the state.<sup>91</sup> Because there was no present possibility of establishing a separate law school for blacks inside the state, only the admission of Murray to the white school could vindicate his personal right to equal treatment.<sup>92</sup>

Murray was admitted to the University of Maryland and completed the regular course of study without academic or social difficulty. At commencement, he was handed his diploma by Governor Herbert O'Connor, who had signed the state's pleadings as attorney general during Murray's litigation with the university. He was hired for his first position as a lawyer by the assistant attorney general who had argued the case against his admission to the law school.<sup>93</sup>

The first of these suits to reach the Supreme Court was *Missouri ex rel. Gaines v. Canada*,<sup>94</sup> in which Lloyd Lionel Gaines challenged his race-based exclusion from the University of Missouri law school.<sup>95</sup> Gaines was an especially attractive plaintiff. He had an excellent scholastic record at Lincoln University, an all-black institution operated by Missouri. Thus, the state could not argue that he lacked the requisite qualifications for admission to the white law school without admitting that Lincoln was not equal to as well as separate from the University of Missouri.<sup>96</sup> The state courts denied relief because Missouri had agreed to establish a law school for blacks in the future and meanwhile provided scholarships for them to attend law schools of comparable quality in adjacent states.<sup>97</sup> Chief Justice Hughes, relying heavily upon the reasoning of the Maryland Court of Appeals in *Murray* and his own dicta in *McCabe*, held that Gaines had the same personal right to a legal education within Missouri as did whites.<sup>98</sup> The

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91. *Id.* at 486-87, 182 A. at 593.

92. *Id.* at 487-89, 182 A. at 594.

93. Record at 290-91.

94. 305 U.S. 337 (1938), *rev'g* 342 Mo. 121, 113 S.W.2d 783 (1937).

95. 305 U.S. at 342.

96. See Kelleher, *The Case of Lloyd Gaines: The Demise of the Separate But Equal Doctrine*, 56 J. NEGRO HIST. 262, 263-64 (1971).

97. 342 Mo. at 132-34, 138-39, 113 S.W.2d at 788, 790-91.

98. 305 U.S. at 351.

Court explained:

The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes [sic] solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State.<sup>99</sup>

In the absence of a black law school, the state would have to enroll him in the otherwise all-white university.<sup>100</sup>

Justice McReynolds, in a dissent joined by Justice Butler, suggested that the *Gaines* decision would permit the state to "abandon her law school and thereby disadvantage her white citizens without improving petitioner's opportunities for legal instruction; or she may break down the settled practice concerning separate schools and thereby, as indicated by experience, damnify both races."<sup>101</sup> He added that Missouri "has offered to provide the negro [sic] petitioner opportunity for the study of law—if perchance that is the thing really desired."<sup>102</sup>

In response to the Supreme Court's ruling, Missouri established a law school for blacks at Lincoln University. *Gaines* failed to appear at the trial at which the equality of the two schools was to be assessed and was never seen again.<sup>103</sup> During the pendency

99. *Id.* at 349.

100. *Id.* at 352.

101. 305 U.S. at 353 (McReynolds, J., dissenting); cf. *Palmer v. Thompson*, 403 U.S. 217 (1971) (permitting city to close municipal swimming pools rather than desegregate them); *Evans v. Abney*, 396 U.S. 435 (1970) (allowing closing of whites-only city park on grounds that land had reverted by operation of state law to heirs of grantor following invalidation of racial restriction in will devising land to city).

102. 305 U.S. at 353 (McReynolds, J., dissenting). The palpable implication was that *Gaines* was more interested in gaining sexual access to white women than in obtaining a law degree. In this regard, Justice McReynolds was reflecting the same social attitudes that were explicit in the Kentucky Court of Appeals opinion in *Berea College* and which traditionally have animated much racist ideology. See G. ALLPORT, *THE NATURE OF PREJUDICE* 349-55 (abridged ed. 1958); B. BETTELHEIM & M. JANOWITZ, *SOCIAL CHANGE AND PREJUDICE* 150-51, 247-48, 287-88 (1964); T. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 270-73 (1965); C. HERNTON, *SEX AND RACISM IN AMERICA* (1966); T. PETTIGREW, *A PROFILE OF THE NEGRO AMERICAN* 139-40 (1964); C. STEMBAR, *SEXUAL RACISM* 4-36 (1976).

103. See Bluford, *The Lloyd Gaines Story*, 32 J. EDUC. SOC. 242, 245 (1959); Kelleher, *supra* note 96, at 267-68.

There is an interesting side note to this story that involves Lucille Bluford herself. She served as executive editor of the *Kansas City Call*. She received her college degree with the aid of one of Missouri's out-of-state scholarships for blacks, then applied to the

of his suit, Gaines obtained an M.A. in economics from the University of Michigan and worked in that state for a time before returning to St. Louis.<sup>104</sup> All of the rumors and theories surrounding his disappearance remain unverified to this day.<sup>105</sup>

While *Gaines* has been characterized as an "enormous milestone,"<sup>106</sup> its significance was far from clear after *Sipuel v. Board of Regents*.<sup>107</sup> The case was virtually on all fours with *Gaines*.<sup>108</sup> Ada Sipuel, the plaintiff, was an honor graduate of Langston University, an Oklahoma state college for blacks that offered no graduate or professional training of any kind.<sup>109</sup> She was excluded from the University of Oklahoma law school due to her race. In a per curiam opinion issued only four days after oral argument, the Court ordered Oklahoma to provide her with a legal education "in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."<sup>110</sup>

The state responded by converting a section of its capitol building to serve as the Langston law school.<sup>111</sup> Sipuel attempted to challenge this response by filing an original action for mandamus in the Supreme Court. The Court concluded that its earlier decision had not addressed the issue of the constitutional adequacy of separate educational institutions. Accordingly, it could not now consider the method of compliance with the original order.<sup>112</sup>

The *Sipuel* case had a happier outcome than did *Gaines*. After

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University of Missouri journalism school. Upon her exclusion from the school on racial grounds, she filed suit, raising the same basic issues as had Gaines. *Bluford v. Canada*, 32 F. Supp. 707 (W.D. Mo. 1940), *appeal dismissed*, 119 F.2d 779 (8th Cir. 1941). The state thereupon opened a journalism school at Lincoln, a school that she refused to attend. See Kelleher, *supra* note 96, at 269-70.

104. Kelleher, *supra* note 96, at 268.

105. See Clayton, *The Strange Disappearance of Lloyd Gaines*, EBONY, May 1951, at 26, 27.

106. R. KLUGER, *supra* note 7, at 213.

107. 332 U.S. 631 (1948) (per curiam), *rev'g* 199 Okla. 586, 190 P.2d 437 (per curiam), *motion for leave to file petition for writ of mandamus denied sub nom.* Fisher v. Hurst, 333 U.S. 147 (1948).

108. See 332 U.S. at 632.

109. See G. CROSS, *supra* note 20, at 65; Hubbell, *The Desegregation of the University of Oklahoma, 1946-1950*, 57 J. NEGRO HIST. 370, 371 (1972).

110. 332 U.S. at 633. The Court cited only *Gaines* in its brief order.

111. See G. CROSS, *supra* note 20, at 52-54; R. KLUGER, *supra* note 7, at 259; Hubbell, *supra* note 109, at 374.

112. Fisher v. Hurst, 333 U.S. 147, 150 (1948) (per curiam). This procedural disposition of the matter prompted Justices Murphy and Rutledge to file dissents. *Id.* at 151.



refusing to enroll in the makeshift black law school,<sup>113</sup> the plaintiff ultimately was admitted to the previously all-white University of Oklahoma law school in June 1949. Except for internal state-imposed segregation similar to that which ultimately was invalidated in one of the companion cases to *Sweatt*,<sup>114</sup> she apparently encountered no unusual difficulties.<sup>115</sup> She received her degree in 1951 and practiced law with an Oklahoma City firm before returning to Langston as an administrator in 1956. Subsequently, she joined the faculty there and chaired the social sciences department for many years.<sup>116</sup>

Ultimately, the Langston law school went out of existence on June 30, 1949, having enrolled just one student.<sup>117</sup> By contrast, the black law school established in response to *Gaines* lasted four years and produced several members of the bar.<sup>118</sup> But the message of the Supreme Court was profoundly ambivalent: it seemed that blacks had no enforceable right to attend all-white public universities if the state provided any sort of alternative education.

As *Sweatt* began making its way through the Texas courts, "separate but equal" appeared to be the law of the land. Segregation was not yet equated with discrimination. Only if a state failed to provide a separate facility within its own borders would the judiciary interfere. Even then, however, there probably

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113. Following the Supreme Court's refusal in *Fisher v. Hurst* to order the desegregation of the University of Oklahoma, her lawyers filed suit in state court claiming that the "overnight" Langston law school was not equal to the white school. At trial, Professor Henry H. Foster of the University of Oklahoma, a native of the state, called the overnight school "a fake, fraud, and deception." G. Cross, *supra* note 20, at 81-82; Hubbell, *supra* note 109, at 374. More restrained criticisms of the inadequacies of Langston came from Professors Walter Gellhorn of Columbia, Max Radin of the University of California, and Charles Bunn of the University of Wisconsin and from Deans Erwin Griswold of Harvard and Earl G. Harrison of the University of Pennsylvania. The state court, ruling the social and economic effects of segregation irrelevant, refused to admit testimony by Robert C. Weaver, Dean Charles Thompson of the Howard University graduate school, and Robert Redfield, chairman of the anthropology department at the University of Chicago. G. Cross, *supra* note 20, at 83; Hubbell, *supra* note 109, at 374 n.22.

114. *See infra* notes 231-235 and accompanying text.

115. *See* Report of the First Negro Student to Enter the Law School, University of Oklahoma, Brief for the Texas Council of Negro Organizations as Amicus Curiae, App. D, *Sweatt v. Painter*, 339 U.S. 629 (1950) [hereinafter cited as Texas Council Amicus Brief]; G. Cross, *supra* note 20, at 113-14, 116-17.

116. G. Cross, *supra* note 20, at 134.

117. *Id.* at 114; Hubbell, *supra* note 109, at 378.

118. *See* Kelleher, *supra* note 96, at 270.

would not be a very rigorous analysis of the equality of the segregated institutions.<sup>119</sup> This result followed from the judicial conception of education as a matter primarily of state and local concern, a conception reflected in the Court's resolution of other educational issues over the previous century and a half.

### B. Other Education Decisions

1. *The Early Cases.*—Not until 1906, in *Speer v. Colbert*,<sup>120</sup> did a true educational issue reach the Supreme Court. Even then, the principal question was the validity of a bequest to Georgetown University to support research in colonial history.<sup>121</sup> After disposing of various procedural and interpretive issues,<sup>122</sup> Justice Peckham rejected the challenger's argument that the school's charter did not authorize the university to accept the gift. He reasoned that Georgetown was empowered to instruct its students in the liberal arts and sciences and that "[t]he cultivation of historical research would seem to be a part of a liberal education."<sup>123</sup>

More typical of the early cases was the first, and perhaps the most celebrated, *Trustees of Dartmouth College v. Woodward*.<sup>124</sup> Chief Justice Marshall began by observing that "education is an object of national concern and a proper subject of legislation,"<sup>125</sup> and the underlying controversy involved important questions re-

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119. There were, however, some cases suggesting increased judicial sensitivity to racial discrimination. See, e.g., *Hurd v. Hodge*, 334 U.S. 24 (1948) (barring judicial enforcement of racially restrictive covenants in the District of Columbia); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (barring state judicial enforcement of racially restrictive covenants); *Oyama v. California*, 332 U.S. 633 (1948) (holding unconstitutional a state law prohibiting Japanese aliens from owning land); *Smith v. Allwright*, 321 U.S. 649 (1944) (holding white primaries conducted by political party unconstitutional); see also *supra* notes 74-80 and accompanying text.

120. 200 U.S. 130 (1906).

121. *Id.* at 133-34.

122. The bequest was not void for misnomer (the testator had devised to Georgetown University, while the school had been incorporated as Georgetown College) since the bequest clearly was intended for this particular institution. *Id.* at 141-43. The gift also included a provision for a medical scholarship. The Court rejected a claim that its terms were too indefinite to enforce, pointing to the conditions contained in the will. *Id.* at 146-47. Neither was the bequest void for conflict with a statute barring such gifts to sectarian institutions since Georgetown was open to students of all faiths and did not aim to propagate any particular religious creed. *Id.* at 143-44.

123. *Id.* at 145 (quoting 24 App. D.C. 187, 204 (1904)).

124. 17 U.S. (4 Wheat.) 518 (1819).

125. *Id.* at 634.

specting political and religious control over higher education.<sup>126</sup> Nevertheless, the litigation concerned the meaning of the contract clause of the Constitution.<sup>127</sup> The trustees challenged a set of amendments to the college charter which substantially increased the power of the State of New Hampshire over the institution's affairs.<sup>128</sup> The Court determined that the charter was a contract which the state had impaired by its amendments.<sup>129</sup> The most important legal proposition in the decision, however, may have been the suggestion made explicitly by Justice Story and implicitly by Chief Justice Marshall that states could reserve the power to amend corporate charters.<sup>130</sup>

Similarly, in *Head v. University of Missouri*,<sup>131</sup> a mathematics professor challenged a statute that discharged the entire university faculty in the middle of his term of appointment and set up a new board of curators. The new board promptly hired a new mathematician.<sup>132</sup> The Court viewed the matter as a simple contract question. The professor had accepted the position "subject to law." Thus, his employment was terminable at the will of the legislature.<sup>133</sup> Moreover, Head could hardly claim to have been surprised by the faculty purge. He had been hired as a replacement after a prior statute had dismissed all of the incumbent instructional staff.<sup>134</sup> Nowhere did the Court express the slightest interest in the consequences of the instability of the faculty for the university or for its students.<sup>135</sup>

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126. See generally Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 Ky. L.J. 643, 666-95 (1982).

127. U.S. CONST. art. I, § 10, cl. 1.

128. 17 U.S. (4 Wheat.) at 626.

129. *Id.* at 651-53.

130. *Id.* at 708, 712 (Story, J., concurring); see also *id.* at 638 (opinion of the Court); cf. *Berea College v. Kentucky*, 211 U.S. 45, 56-57 (1908) (explicit right of amendment reserved in charter permits state to prohibit instruction of racially mixed groups).

131. 86 U.S. (19 Wall.) 526 (1873).

132. The plaintiff had been selected for a six-year term. Slightly over three years later the legislature took the action which gave rise to this suit. *Id.* at 530.

133. *Id.* at 530-31.

134. *Id.* at 531.

135. It is not at all clear that *Head* would come out differently today. As the Court explained in a seminal modern due process case involving the dismissal of an untenured professor at a state university, a public employee is entitled to a pretermination hearing only if the employment implicates a liberty or property interest. A liberty interest arises if the government publishes information about a discharged employee that might jeopardize that person's good name or reputation. A property interest is "a legitimate claim of entitlement" arising from "an independent source such as state law" rather than from

Therefore, the significance of *Speer* should not be exaggerated. While it contained the first discussion of educational philosophy that was not dictum, the Court applied minimum scrutiny to the practice at issue. In this sense, the decision followed the traditional notion of education as a state and local matter. The NAACP attorneys in *Sweatt*, then, could not rely upon the case as a predicate for forcing close judicial inquiry into the quality of segregated law schools.

2. *Freedom of contract and substantive due process.*—Some dicta by Justice Holmes a year later implied that upon a sufficiently strong showing, a plaintiff might overturn a state educational policy on constitutional grounds.<sup>136</sup> The hint was equivocal at best, however,<sup>137</sup> and was quickly forgotten in the era of substantive due process.<sup>138</sup> Indeed, that theory provided the basis for

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the Constitution. *Board of Regents v. Roth*, 408 U.S. 564, 573, 577 (1972). That legitimate claim of entitlement may arise from "mutually explicit understandings" even in the absence of a controlling state statute. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

It is unlikely that Head could have prevailed on any procedural due process claim. Unless the curators published potentially derogatory information about him, he could not assert the deprivation of a liberty interest. The mere fact of discharge from public employment does not call into question an individual's good name or reputation. *Bishop v. Wood*, 426 U.S. 341, 348-49 (1976). And while recent cases make clear that procedural protections for property interests are a matter of federal law, *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487, 1492-93 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982); *Vitek v. Jones*, 445 U.S. 480, 491 (1981), Head could not demonstrate any basis in state law for asserting a property interest that would trigger those protections.

Head could not have overturned his dismissal on substantive grounds unless he could show that it was based upon an impermissible reason. There is no indication, however, that he had been fired in retaliation for exercising his constitutional rights or for any other prohibited reason. Cf. Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 282 n.112 (despite losing on procedural due process claim, Professor Roth was ultimately awarded compensatory and punitive damages of \$6,746 on grounds that he had been terminated for reasons that violated the first amendment).

136. *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 86-88 (1907). In this case, the transit company challenged a statute requiring that it transport school children at half price. After finding that the regulation had taken effect before the company began operations and rejecting the challenge on this ground, *id.* at 84-85, Holmes noted the public importance of education and the latitude that the states enjoyed under the police power to promote it. *Id.* at 87-88.

137. *Id.* at 87 (suggesting that the fourteenth amendment must allow states "a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased").

138. See, e.g., *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Lochner v. New York*, 198 U.S. 45 (1905).

the first decisions holding state education regulations invalid, and Justice Holmes dissented from them.

In *Meyer v. Nebraska*<sup>139</sup> and *Bartels v. Iowa*,<sup>140</sup> teachers of German challenged state laws prohibiting instruction in foreign languages.<sup>141</sup> Justice McReynolds found an obvious interference with the rights of the teachers to teach, of pupils to learn, and of parents to control the education of their children, an interference not rationally related to any legitimate state interest.<sup>142</sup> Although the opinion contains stirring language emphasizing the importance of education,<sup>143</sup> the case turned on two narrow points of law. First, the statutes interfered with freedom of contract.<sup>144</sup> Second, at least two of the legislative regulations were arbitrary in that they applied only to the teaching of certain foreign languages.<sup>145</sup>

139. 262 U.S. 390 (1923).

140. 262 U.S. 404 (1923).

141. *Meyer* involved a Nebraska statute which prohibited the teaching of any language other than English to any pupil who had not completed the eighth grade. *Meyer*, 262 U.S. at 397. *Bartels* concerned three state laws. One was the same statute that gave rise to the *Meyer* case. *Bartels*, 262 U.S. at 411. The others were from Iowa and Ohio. The Iowa law barred instruction in any language other than English in secular subjects, except that schools could teach foreign languages to students who had gone beyond eighth grade. Ohio simply forbade instruction in German of pupils below eighth grade. *Id.* at 409-10.

In *Meyer*, an Evangelical Lutheran parochial school teacher was convicted of using a collection of biblical stories in German while teaching a 10-year-old. 262 U.S. at 396-97. The consolidated cases in *Bartels* involved similar facts. In the first, an Iowa parochial school teacher was convicted of teaching his pupils to read German. In the second, two Ohio parochial school teachers likewise were convicted of teaching the German language to primary school pupils. In the third, the Nebraska District of the Missouri Synod of the Lutheran Church sought to enjoin state and local officials from enforcing Nebraska's language law against church schools. See *Bartels*, 262 U.S. at 409-11.

142. *Meyer*, 262 U.S. at 401, 402-03. *Bartels* was decided the same day and on the authority of *Meyer*. 262 U.S. at 409.

143. Justice McReynolds observed that "[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted." *Meyer*, 262 U.S. at 400. He illustrated this point by quoting from the Northwest Ordinance. *Id.* He then went on to quote from Plato on the public importance of education. *Id.* at 401-02.

144. On freedom of contract, Justice McReynolds wrote:

Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] Amendment.

*Id.* at 400.

145. The Ohio statute applied only to the teaching of German. See *supra* note 141. The Nebraska courts had construed their statute as applying only to modern languages.

Two years later, the Court struck down an Oregon law requiring that all children between the ages of eight and sixteen attend public schools. Applying his *Meyer* rationale in *Pierce v. Society of Sisters*,<sup>146</sup> Justice McReynolds found the statute "arbitrary, unreasonable and unlawful."<sup>147</sup> Once again, he recognized the social significance of education, noting that the case did not present any issue as to the power of the state to require school attendance or to establish minimum qualifications for teachers or curricular coverage.<sup>148</sup> As in *Meyer*, he went on to underscore the right of parents to control the upbringing of their children.<sup>149</sup> The states lacked power "to standardize [their] children by forcing them to accept instruction from public teachers only."<sup>150</sup> While this statement might be taken as an endorsement of the value of educational diversity and the benefits of competition in the academic sphere, it more likely reflects the Court's general hostility to government regulation of social and economic matters. This interpretation is supported by the Court's emphasis upon the threatened destruction of the business and property of the operators of private and parochial schools.<sup>151</sup>

Thus, these decisions suggested that in a proper case the Court would scrutinize educational policies with some care. They could not provide Sweatt with grounds for much optimism, however. For one thing, the substantive due process-freedom of contract mode of jurisprudence, upon which they rested, had fallen into disrepute.<sup>152</sup> For another, the author of these opin-

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*Meyer*, 262 U.S. at 400-01. Justice Holmes dissented in both cases, noting that a state reasonably might decide to require instruction only in English for primary students in the interest of promoting the use of a common tongue. *Bartels*, 262 U.S. at 412 (Holmes, J., dissenting). Nevertheless, he concurred in the result in the Ohio case because he viewed the special provision for German as impermissible. *Id.* at 413.

146. 268 U.S. 510 (1925).

147. *Id.* at 536.

148. *Id.* at 534.

149. *Id.* at 534-35.

150. *Id.* at 535.

151. The plaintiffs were a religious order and a private corporation which operated parochial and military schools. *Id.* at 531-33. Beyond their business and property interests, they were permitted to assert the rights of parents and pupils affected by the state law. *Id.* at 535-36; cf. *Farrington v. Tokushige*, 273 U.S. 284 (1927) (enjoining enforcement of territorial law imposing detailed regulations upon private schools conducted in Japanese and other foreign languages on grounds that implementation probably would destroy the schools, resulting in a deprivation of property without due process of law).

152. See, e.g., *United States v. Darby*, 312 U.S. 100 (1940); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937);

ions had written an icy dissent in *Gaines* suggesting that the type of racial classification at issue in *Sweatt* posed no constitutional problems,<sup>153</sup> and the ultimate outcome in *Sipuel* seemed to confirm that view.

3. *The religion clauses.*—At the same time, a parallel line of cases implied the development of increasing judicial sensitivity to the relationship of religion to education. Not surprisingly, the Court began cautiously, refusing to disturb federal payments for sectarian Indian schools<sup>154</sup> and state provision of textbooks to parochial as well as public school pupils.<sup>155</sup>

The decision in *Hamilton v. Regents of the University of California*<sup>156</sup> contained a more searching analysis, but the result was the same. Several college freshmen were suspended after they refused to enroll in a required ROTC course because of their religious beliefs.<sup>157</sup> The Court rejected each of their arguments. First, the university regulation did not violate the privileges and immunities clause of the fourteenth amendment since the privilege of attending the institution came from the state, not a federal entity.<sup>158</sup> Second, the students had no due process right to exemption from military training.<sup>159</sup> Third, the ROTC require-

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NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

Then-Professor Frankfurter, while applauding the spirit of toleration promoted by the result in *Pierce*, criticized the substantive due process rationale underlying it as a cost "on the whole . . . greater than its gains." *Can the Supreme Court Guarantee Toleration?*, 43 NEW REPUB. 85, 86 (1925), reprinted in F. FRANKFURTER, LAW AND POLITICS 195, 197 (1939); see also A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 25 (1970).

153. See *supra* notes 101-102 and accompanying text.

154. *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

155. *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

156. 293 U.S. 245 (1934).

157. The plaintiffs were sons of clergymen whose churches had petitioned to have their members exempted from all military training as conscientious objectors. At the start of the fall term, the students unsuccessfully sought to be excused from the ROTC requirement. They then refused to take the course and were suspended pursuant to a board of regents regulation. *Id.* at 250-56. The students offered to take any alternative course which the university proposed, but that offer was refused. *Id.* at 254.

158. *Id.* at 261. In fact, the University of California had accepted benefits under the Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified at 7 U.S.C. §§ 301-05, 307-08 (1982)). This in turn obligated the institution to offer some form of military training. The state, however, retained control of the details of that training. *Hamilton*, 293 U.S. at 258-59.

159. The Court found that conscientious objectors had no constitutional protection from military service or training, although Congress might provide exemptions by means of legislation. *Hamilton*, 293 U.S. at 264. On the other hand, citizens owed the

ment did not conflict with the Kellogg-Briand Pact, under which the United States had renounced war as an instrument of national policy.<sup>160</sup>

More significantly, *Hamilton* rejected an argument that would be central in *Sweatt*: that the students had a unique interest in attending a particular institution. They claimed that the University of California had denied them the opportunity for higher education of a quality that was not available elsewhere except at prohibitive cost.<sup>161</sup> The majority dismissed this position as "untenable."<sup>162</sup> Justice Cardozo's concurrence suggested that the ROTC requirement might be "unwise or illiberal or unfair" as applied to conscientious objectors, but that alone did not raise a constitutional issue.<sup>163</sup> Thus, if a state effectively could exclude students from a university on the basis of their most fundamental religious beliefs, at least where those students might attend a less prestigious state college, perhaps a state also could exclude students from one law school on the basis of their race where the state provided a less prestigious alternative within its own borders. The situations differ, of course, because race is immutable, whereas religious beliefs may not be. Moreover, the equality of any alternative institution was not at issue in *Hamilton*, whereas that was the fundamental question in *Sweatt*. Nevertheless, such a conclusion followed from the logic of *Gaines* and *Sipuel*.

Certain post-*Hamilton* developments, however, implied that the Court was becoming increasingly sensitive to the integrity of the educational process. In particular, *West Virginia State Board of Education v. Barnette*<sup>164</sup> held a compulsory flag salute regulation unconstitutional as applied to Jehovah's Witnesses.<sup>165</sup> Justice Jackson found the "delicate" responsibility of school officials to

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government, which had the responsibility to maintain peace and order, the duty of defending it against all enemies. *Id.* at 262.

160. *Id.* at 265.

161. *Id.* at 254.

162. *Id.* at 262.

163. *Id.* at 266 (Cardozo, J., joined by Brandeis & Stone, JJ., concurring). Justice Cardozo pointed out that military instruction did not constitute an establishment of religion, and absent a pledge of subsequent military service there could be no interference with free exercise. Moreover, conscientious objectors historically had been recognized as an act of grace, but often with conditions more onerous than those at issue in this litigation. *Id.* at 266-67.

164. 319 U.S. 624 (1943).

165. *Id.* at 642.



"educat[e] the young for citizenship . . . reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."<sup>166</sup> This conclusion required the overruling of *Minersville School District v. Gobitis*,<sup>167</sup> a precedent of only three years' standing. Justice Frankfurter, who dissented vigorously in *Barnette*,<sup>168</sup> had expressed similar concerns in *Gobitis* but felt that the Court should abjure judicial resolution of the competing policy questions lest it become "the school board of the country."<sup>169</sup>

While the flag salute cases involved special dispensation for religious believers, two others decided while *Sweatt* was making its way through the state courts dealt with affirmative assistance to church-related schools. In *Everson v. Board of Education*,<sup>170</sup> a closely divided Court upheld a system of partial reimbursement of the transportation costs of public and parochial school students.<sup>171</sup> Noting the inherent tension between the establishment and free exercise clauses of the first amendment, the majority reasoned that the program served a public purpose and was neutral as between believers and nonbelievers.<sup>172</sup> The four dissenters, on the basis of their interpretation of the record, rejected both of these conclusions.<sup>173</sup>

The following year, in *Illinois ex rel. McCollum v. Board of Education*,<sup>174</sup> the Court had much less difficulty in finding released-time religious training unconstitutional. The program at issue permitted sectarian instructors to offer students, while in school buildings during school hours, up to forty-five minutes of weekly instruction in the tenets of their faith.<sup>175</sup> Justice Black, who had

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166. *Id.* at 637.

167. 310 U.S. 586 (1940).

168. 319 U.S. at 646.

169. 310 U.S. at 598. To this Justice Jackson replied, "The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures—Boards of Education not excepted." 319 U.S. at 637.

170. 330 U.S. 1 (1947).

171. *Id.* at 3.

172. *Id.* at 7, 16-18.

173. *Id.* at 19-22 (Jackson, J., joined by Frankfurter, J., dissenting); *id.* at 50-52 (Rutledge, J., joined by Frankfurter, Jackson & Burton, JJ., dissenting).

174. 333 U.S. 203 (1948).

175. The program offered sectarian instruction to students in grades four through nine provided that their parents consented in writing. The teachers were members of the clergy and active lay congregants. *Id.* at 207-09.

written the prevailing opinion in *Everson*, saw this as direct aid to religion which the establishment clause prohibited.<sup>176</sup> While the difficulty of reconciling the two cases prompted several other opinions, only one Justice dissented.<sup>177</sup>

Despite the inconsistency of these decisions, which upheld the challenged practices as often as not, they reflected an underlying trend away from complete judicial deference to the views of educators. In each of these cases, the plaintiffs' arguments received serious consideration. Their claims were sometimes rejected, but only because either the particular facts did not bring the plaintiffs within the rule for which they were contending<sup>178</sup> or compelling policy concerns made relief inappropriate.<sup>179</sup> This trend suggested that the Court might reexamine the *Plessy* doctrine as applied to education. At the least, the refusal to review Oklahoma's compliance with *Sipuel* because that question had not been presented properly virtually compelled the conclusion that the Justices would clarify the meaning of equality. For that to happen, however, a litigant would have to make the necessary record.

### III. Making the Record

Establishing either the unconstitutionality of segregation or the inequality of the two institutions in *Sweatt* would prove difficult. Texas not only had announced its intention to open a separate law school for blacks, as Missouri had in *Gaines*,<sup>180</sup> but had proceeded in apparent good faith to create a full-fledged "university of the first class" in response to the plaintiff's application

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176. *Id.* at 210, 212. This decision does not undermine the argument that *Sweatt* marked the first time that the Court looked to the substance rather than the form of education. *McCullum* explicitly turns on the direct aid to religion. Thus, the Court focused on the form of the program, even though some members addressed substantive aspects of the matter. See 333 U.S. at 212 (opinion of Frankfurter, J., joined by Jackson, Rutledge & Burton, JJ.).

177. In addition to Justice Frankfurter's opinion, in which all of the *Everson* dissenters joined, Justice Jackson concurred. Only Justice Reed dissented.

178. See *Everson*, 330 U.S. at 6, 16-17; *Hamilton*, 293 U.S. at 261-65.

179. See *Gobitis*, 310 U.S. at 598-99.

180. Texas initially authorized the establishment of a law school at Prairie View University "[w]henver there is any demand for same . . . ." Act of June 1, 1945, ch. 308, § 2, 1945 Tex. Gen. Laws 506 (repealed 1947). Similarly, the curators of Lincoln University had the right, "whenever necessary and practicable in their opinion," to establish any course of instruction. MO. REV. STAT. § 9618 (1929) (repealed 1965), quoted in *Gaines*, 305 U.S. at 346 n.2.

to the white institution, as Oklahoma had not in *Sipuel*.<sup>181</sup> The board of directors of Texas State recruited faculty members vigorously and determined to obtain accreditation for the new law school as quickly as possible.<sup>182</sup> Thus, a victory in this litigation would have very broad implications. A defeat, on the other hand, would force the NAACP to litigate a potentially endless series of suits designed to equalize racially separate educational programs.

Whether Sweatt sought a ruling that the *Plessy* doctrine had no place in the field of public education<sup>183</sup> or simply that Texas had not provided him with a satisfactory alternative forum for legal training, the result hinged on the definition of equality. The courts would have to compare The University of Texas law school with that of the new Texas State University for Negroes to determine whether they were identical, substantially equal, or substantially unequal. Even such seemingly objective factors as student-faculty ratio, class size, and library holdings might rationally be evaluated differently. To the extent that subjective criteria such as prestige and tradition entered the equation, the outcome became even less predictable. The lack of judicial expertise in educational administration, the difficulty of continuous monitoring of substantial equivalence, and the limits on equitable powers to compel specific performance suggested the magnitude of the plaintiff's burden.<sup>184</sup>

An additional complication arose from the legislation establishing the new university, which authorized an interim law school in Austin pending the selection of a permanent site for the

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181. There was no Oklahoma law school for blacks when *Sipuel* filed suit. See *supra* note 109 and accompanying text. Texas had authorized a black law school and in fact offered Sweatt a place in such an institution. See *supra* notes 17 & 27-33 and accompanying text.

182. In its decision, the Supreme Court noted that the school was "on the road to full accreditation." 339 U.S. at 633; O. JOHNSON, *supra* note 19, at 14-15, 49-50, 103-05, 108-09. Ozie Johnson, the first full-time dean of the Texas State law school, suggested that the establishment of the new university benefited black professors in general. The mere existence of a new institution committed to substantial equality with one of the nation's leading research universities stimulated increases in black faculty salaries throughout the South. *Id.* at 14-15.

183. See *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

184. See Leflar & Davis, *supra* note 39, at 393-96. For discussion of the range of factors which were litigated under the "separate but equal" doctrine, see D. BELL, *supra* note 39, at 368-71; Larson, *supra* note 39, at 482 n.27; Leflar & Davis, *supra* note 39, at 403-04, 430-35.

entire institution.<sup>185</sup> At the time of the state court hearing on the equality of the separate facilities, only the temporary black law school had begun operations.<sup>186</sup> The interim Texas State school, located in an office building across the street from the state capitol, was of course unaccredited. Its faculty consisted of three junior professors from The University of Texas, all of whom maintained their offices and teaching responsibilities on the white campus. The dean, registrar, and librarian of the white school served in the same capacities at the black school. Except for a handful of books on hand and about 10,000 volumes on order, Texas State had no library; its students were to have access to the Texas Supreme Court library on the second floor of the capitol.<sup>187</sup> The school opened with an enrollment of two, not including Heman Marion Sweatt, who refused to attend.<sup>188</sup> By contrast, Texas had a nationally distinguished law school. It had a faculty of sixteen full- and three part-time professors, a library of 65,000 volumes, a law review, moot court, other extracurricular activities, and a large corps of prominent alumni to serve its 850 students.<sup>189</sup>

The trial on the question of the equality of the two law schools presented an unusual public debate on educational philosophy between prominent legal academics. Thurgood Marshall, chief counsel for the NAACP Legal Defense Fund and head of the team of attorneys representing Sweatt, relied upon Earl G. Harrison, dean of the University of Pennsylvania law school, and Malcolm P. Sharp, professor of law at the University of Chicago.<sup>190</sup> Texas Attorney General Price Daniel, who personally tried the case for the state, depended upon the testimony of

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185. Act of March 3, 1947, *supra* note 30, § 11.

186. 210 S.W.2d at 446. By the time of the appeal to the Supreme Court, the permanent Texas State law school had opened in Houston. 339 U.S. at 633.

187. 339 U.S. at 633; 210 S.W.2d at 448-50.

188. 210 S.W.2d at 446; O. JOHNSON, *supra* note 19, at 13. The permanent Texas State law school had five full-time professors, 23 students, a 16,500-volume library with a full-time staff, a moot court, and legal aid facilities by the time of the Supreme Court decision. 339 U.S. at 633. In addition, its first alumnus had become a member of the Texas bar. *Id.*

189. 339 U.S. at 632-33.

190. This was not the only time during this period that Marshall had brought in academic experts to testify against segregation. In *Sipuel* his witnesses included Dean Erwin Griswold of Harvard and Professors Max Radin of the University of California, Walter Gellhorn of Columbia, and Charles Bunn of the University of Wisconsin, in addition to Dean Harrison and Professors Redfield and Thompson. See G. CROSS, *supra* note 20, at

Dean Charles T. McCormick and Professor A.W. Walker, Jr., of The University of Texas.

The most basic contrast between the two schools concerned physical arrangements. The University of Texas law school occupied an entire building that had been designed for the purpose, whereas the Texas State law school was located on the bottom floor of an office building.<sup>191</sup> The white school had three classrooms to serve its 850 students, while the black school had two classrooms to serve its projected enrollment of ten. Moreover, the Texas law school building was severely overcrowded, accommodating approximately twice as many students as originally planned.<sup>192</sup> Thus, according to Dean McCormick, Texas State had "at least equal and probably superior facilities for the study of law."<sup>193</sup> He conceded, however, that he meant equal in quality rather than equal in size.<sup>194</sup>

Similarly, Dean McCormick admitted that Texas State students would have to use the Supreme Court library across the street from the school until the arrival of the books that had been ordered. Of course, The University of Texas library had a larger collection, and one assembled for use by students and scholars rather than by practitioners and judges. Still, the two facilities were at least arguably equal in that the court library offered more space per student than the "exceedingly crowded" university library.<sup>195</sup>

Other aspects of the two schools were identical. For example, both followed the same curriculum and imposed the same admis-

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80-81, 83; R. KLUGER, *supra* note 7, at 258; Hubbell, *supra* note 109, at 374 & n.22; *see also supra* note 113.

191. The precise characterization of the floor which the interim Texas State law school occupied was a source of controversy throughout the proceedings. At trial, Sweatt's lawyers consistently referred to it as the basement. *See, e.g.*, Record at 88-89, 350. Dean McCormick described it as the first floor, but he conceded that it was four or five steps below the level of the sidewalk. Record at 88. In the Supreme Court, Thurgood Marshall referred to Texas State as a "basement law school." 18 U.S.L.W. 3280 (1950) (summary of oral argument); Brief for Petitioner at 71.

192. Record at 76-79 (testimony of Dean McCormick).

193. Record at 109.

194. Record at 110.

195. Record at 79. Dean McCormick also recognized that the 10,000 volumes destined for the Texas State library would not fit on the single floor of the building in which the black school was located. He pointed out, however, that the institution had an option to take over all of the remaining space as needed. Record at 89.

sion requirements.<sup>196</sup> In addition, the instructors in the first-semester courses at Texas State were teaching the same courses simultaneously at Texas.<sup>197</sup> Thus, all applicants would be equally qualified; once enrolled, students would at least in theory learn common subjects from a common faculty.

In short, there were some obvious differences in physical resources and facilities between Texas and Texas State. If that were the crux of the dispute, however, the *Sweatt* case would have been a lot simpler. Whatever the physical differences between the two law schools, it was not at all clear that they were unequal in a legal sense. Precisely because the argument based upon physical disparities was ambiguous, Marshall devoted most of his case to establishing the existence of more subtle qualitative differences between the two schools. Most of this aspect of the trial focused upon the effects of the much smaller class size at Texas State.

Even these intangible factors lent themselves to conflicting interpretations, however. Dean McCormick and Professor Walker, for example, emphasized that small classes presented unusual opportunities for personal instruction.<sup>198</sup> Thus, "[i]n a class of ten, all of the students are on their toes all the time, because they realize they are apt to be called upon next."<sup>199</sup> Marshall's experts noted that Sweatt had been the only black law school applicant when Texas State was created and condemned the minuscule class size projected for Texas State. Dean Harrison said that it would be "mistaken, even absurd, to speak of any institution that has one student as a law school."<sup>200</sup> Professor Sharp emphasized that even if ten students enrolled, the new school could not offer an education equal to that provided at Texas.<sup>201</sup>

These professors concentrated on what they regarded as the most important shortcomings of Texas State. First, racially restrictive enrollment policies would deny its students the benefits

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196. Record at 81-82, 84.

197. Record at 84, 113. All three professors were in their first year of law teaching. Record at 93.

198. Record at 117 (testimony of Dean McCormick); Record at 305-06, 314 (testimony of Professor Walker).

199. Record at 306 (testimony of Professor Walker).

200. Record at 216-17.

201. Record at 343.

of interchange and association with a community that reflected the diverse viewpoints and experiences of the general populace.<sup>202</sup> Second, the extremely small size of the class would prevent effective instruction in the case method<sup>203</sup> and the maintenance of a law review, moot court, full-time faculty, and other indicia of an outstanding law school.<sup>204</sup> Third, the complete absence of upperclassmen during Sweatt's first year would deny him important educational benefits, a loss that would defeat his personal right to legal training equal to that provided at The University of Texas.<sup>205</sup> By whatever criteria, then, the two schools were not equal.

The trial also featured a clash of views on segregated education. On this issue, Marshall called Robert Redfield, a lawyer and chairman of the anthropology department at the University of Chicago. For its part, the state called Benjamin F. Pittenger, who recently had retired as dean of education at The University of Texas. Professor Redfield emphasized that segregation interfered with the learning process in several ways. First, compelled separation prevented students from meeting and learning about members of the groups from which they were isolated. Second, segregation engendered racial suspicion and distrust. Education for all would be enhanced in an environment that was broadly representative of the total community.<sup>206</sup> He recognized that

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202. Record at 197, 200, 226-27 (testimony of Dean Harrison); Record at 341-42, 348-53 (testimony of Professor Sharp).

203. Record at 216-18, 225-26 (testimony of Dean Harrison); Record at 342-43 (testimony of Professor Sharp).

204. Record at 220-23 (testimony of Dean Harrison); Record at 355-57 (testimony of Professor Sharp).

Dean McCormick testified that the absence of these programs from Texas State was not significant at the time of trial because none was open to first-year students. Record at 104-07, 112. Indeed, he characterized these activities as "minor and extraneous." Record at 106. Professor Walker agreed with respect to the absence of a law review. Record at 316. Dean McCormick suggested, however, that a law review might be established as part of "the natural evolution of a well-conducted law school." Record at 107.

Both Dean Harrison and Professor Sharp emphasized that the existence of a law review helped to create incentives for academic excellence for all students. Record at 221 (testimony of Dean Harrison); Record at 347 (testimony of Professor Sharp). Indeed, Professor Sharp maintained that the law review is "[o]ne of the most important" elements of legal education because its existence "sets the tone" of the entire institution. Record at 347.

205. Record at 219 (testimony of Dean Harrison); Record at 347 (testimony of Professor Sharp).

206. Record at 194-95, 197.

some forms of segregation could not be eliminated immediately. Nevertheless, laws requiring segregation could "be changed quickly."<sup>207</sup> In particular, "in every community there is some segregation that can be changed at once, and the area of higher education is the most favorable for making the change."<sup>208</sup>

Dean Pittenger, on the other hand, contended that blacks could receive a substantially equal education in separate colleges and universities. He based his conclusion, in large measure, upon the view that blacks would have a better overall experience in a segregated institution; they would find more opportunities to participate in extracurricular activities and to develop leadership skills.<sup>209</sup> Underlying his position, however, was a concern for the effects of desegregation upon public schools more generally. He could not see how segregation, once breached at the university level, could be maintained in the elementary and secondary grades. If these classes were integrated, Dean Pittenger feared for the future of white support for the public schools:

I think it is reasonable to believe that at the present time the attitude of Texas people being what it is to a very considerable degree, that the effect of the abandonment of segregation on the lower level would set back the public school movement in this state, and as one who has devoted his life to an attempt to improve it, I can't regard that with equanimity.<sup>210</sup>

He also thought it unlikely that whites would accept the assignment of the many black teachers who staffed segregated schools to mixed classrooms. This would deprive many black professionals of their livelihood. Moreover, since many black college graduates pursued teaching careers, desegregation ultimately might discourage younger blacks from seeking higher education for fear that they would be unemployable.<sup>211</sup>

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207. Record at 198.

208. Record at 199.

209. Record at 323-25.

210. Record at 327. Dean Pittenger further explained

that it would become . . . a bonanza to the private white schools of the State, and that it would mean the migration out of the schools and the turning away from the public schools of the influence and support of a large number of children and of the parents of those children . . . .

Now, the south has had to fight against the private school tradition since the beginning. . . . [T]he fight for public education in this State has been to a very large extent the matter of the converting of people with that background to the support of public schools, and to the patronage of public schools.

Record at 326.

211. Record at 326-27.



To buttress his arguments against segregated schooling, Marshall also tendered testimony from Charles H. Thompson, dean of the graduate school at Howard University and editor of the *Journal of Negro Education*, concerning disparities between black and white colleges in Texas and from Donald G. Murray, the successful plaintiff in the University of Maryland case that had preceded *Gaines*,<sup>212</sup> concerning his experience as the first black student at that institution.<sup>213</sup> The trial court permitted both witnesses to testify in order to afford a complete record on appeal but ultimately refused to consider their evidence in reaching its decision.<sup>214</sup>

The significance of Marshall's trial strategy cannot be exaggerated. By focusing upon the benefits of integrated education and upon the suspicion and intolerance engendered by segregation, he sought for the first time to move the legal debate away from preoccupation with the purely physical differences in the separate facilities provided for whites and blacks. Perhaps he did so out of concern that the purely physical differences between the two schools were not great enough to constitute inequality under the *Plessy* doctrine. In a larger sense, however, this novel approach harkened back to the point of Justice Harlan's dissent in that case: whites had imposed segregation because they regarded blacks as subhuman beings who were unfit to participate in civilized society. The equality of the separate facilities was entirely irrelevant to this overriding precept, the truth of which Harlan said no one would be so wanting in candor as to deny. Yet for half a century American society had denied it.

The Texas courts were no different. The trial court focused upon the state's moral and financial commitment to an entirely new institution offering "substantially equal facilities" and having identical entrance, curricular, and graduation requirements, as well as the same faculty and courses as those provided at The University of Texas. Accordingly, Sweatt "would be afforded

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212. *Pearson v. Murray*, 169 Md. 478, 182 A. 590 (1936). For discussion of this case, see *supra* notes 88-93 and accompanying text.

213. Record at 228-86 (testimony of Dean Thompson); Record at 287-91 (testimony of Murray).

214. The court considered Dean Thompson's testimony only as it compared the Texas State program with that of The University of Texas. The judge rejected his evidence concerning other institutions in the state. The court ruled Murray's testimony inadmissible in its entirety. 210 S.W.2d at 446.

equal if not better opportunities for the study of law in [the] separate school" at Texas State.<sup>215</sup> Thus, he had suffered no cognizable injury as a result of his exclusion from the white university. Nevertheless, the record had been made.

This record did not impress the Court of Civil Appeals, which affirmed the judgment. That court first refused to consider the constitutional validity of "separate but equal" education on the basis of an "unbroken line" of United States Supreme Court decisions upholding segregation.<sup>216</sup> Any claim that separate schools were inherently discriminatory, at least at the graduate and professional level, was "predicated upon a purely abstract and theoretical hypothesis, wholly unrelated to reality."<sup>217</sup> Since this case dealt with the world with all its imperfections rather than some hypothetical ideal state, the trial court had correctly applied the test of "substantial" rather than "absolute" equality. The testimony of Professor Redfield and the other experts on the harmful effects of separate schools likewise addressed the wisdom rather than the constitutionality of the state's policy of segregation.<sup>218</sup> The evidence demonstrated "an enormous outlay both in funds and in carefully and conscientiously planned and executed endeavor, in a sincere and bona fide effort to afford every reasonable and adequate facility and opportunity" to Sweatt for the study of law in a separate but equal public institution.<sup>219</sup>

When the Texas Supreme Court denied review,<sup>220</sup> the case was on its way to the Supreme Court of the United States. This time, Marshall made certain that the Justices would reach the merits. He presented only one question for review: "May the State of Texas Consistently With the Requirements of the Fourteenth Amendment Refuse to Admit [Sweatt] Because of Race and Color to the University of Texas School of Law?"<sup>221</sup>

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215. *Sweatt v. Painter*, No. 74,945 (126th Dist. Ct., Travis County, Tex., June 17, 1947) (unpublished), Record at 440.

216. 210 S.W.2d at 444 & n.1.

217. *Id.* at 445.

218. *Id.*

219. *Id.* at 447.

220. *Sweatt v. Painter*, No. A-1695 (Tex. Sept. 29, 1948).

221. Petition for Certiorari at 13.

#### IV. The Supreme Court Proceedings

##### A. *The Making of a Trilogy*

The petition for certiorari was filed on March 23, 1949.<sup>222</sup> The Court took no immediate action on the petition and held it over to the term beginning in October.<sup>223</sup> Review was ultimately granted on November 7.<sup>224</sup> As if to underscore its significance, the Court scheduled *Sweatt* for consideration simultaneously with two other important civil rights cases, *Henderson v. United States*<sup>225</sup> and *McLaurin v. Oklahoma State Regents for Higher Education*.<sup>226</sup> Both cases involved the physical isolation of blacks who were admitted to facilities open to whites. While these cases appear easy in retrospect, in both instances the lower courts had upheld segregation.

In *Henderson*, a black government employee was denied dining car service by the Southern Railway while traveling on official business.<sup>227</sup> A railroad rule required segregated seating in the dining car. Under the regulation, most of the tables were reserved exclusively for whites; two were conditionally set aside for blacks. Those tables were available to white passengers if all of the remaining tables were occupied. When those tables were oc-

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222. 17 U.S.L.W. 3290 (1949).

223. See 17 U.S.L.W. 3379 (U.S. June 27, 1949) (order carrying over all unresolved matters). It is not clear whether the Court delayed action on the petition out of reluctance to address potentially explosive issues or due to lack of time. See Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958*, 68 Geo. L.J. 1, 15 (1979).

224. 338 U.S. 865 (1949).

225. 339 U.S. 816 (1950). The Court wasted no time in setting this case for plenary consideration. The jurisdictional statement was filed on February 17, 1949. 17 U.S.L.W. 3276 (1949). The Court noted probable jurisdiction on March 14. 69 S. Ct. 740 (1949).

226. 339 U.S. 637 (1950). The Court delayed action on this case even longer than it did in *Sweatt*. The jurisdictional statement was filed on March 1, 1949, 17 U.S.L.W. 3290 (1949), but the noting of probable jurisdiction did not occur until November 7. 70 S. Ct. 139 (1949). The Court's lack of haste apparently arose from concern that the case may have become moot due to McLaurin's uncertain academic status at the end of his first semester at the University of Oklahoma. This issue was resolved when counsel assured the Court that McLaurin was continuing his studies in good standing. See Hutchinson, *supra* note 223, at 15 n.112.

227. The incident in question occurred in May 1942. Elmer Henderson was a field representative of the President's Committee on Fair Employment Practices. He made his trip to investigate alleged incidents of discrimination in Alabama. Brief for the United States at 4, *Henderson v. United States*, 339 U.S. 816 (1950) [hereinafter cited as *Henderson Brief*].

cupied by blacks, a curtain was drawn to separate them from the white tables. Henderson went to the dining car three times in an unsuccessful effort to obtain a meal, but each time whites were sitting at the black tables.<sup>228</sup> Henderson filed a complaint with the Interstate Commerce Commission claiming that he had been subjected to "undue or unreasonable prejudice or disadvantage" in violation of section 3(1) of the Interstate Commerce Act.<sup>229</sup> The Commission rejected the complaint, and a divided three-judge court affirmed that ruling.<sup>230</sup>

The *McLaurin* case arose in the wake of *Sipuel*. George McLaurin, a senior professor at Langston University who wanted to obtain a doctorate,<sup>231</sup> was one of half a dozen other blacks who

228. *Id.* at 3; *Henderson*, 339 U.S. at 818-20.

229. Ch. 104, § 3, 24 Stat. 379, 380 (1887) (renumbered § 3(1) by Transportation Act of 1920, ch. 91, § 405, 41 Stat. 456, 479) (current version at 49 U.S.C. § 10741(b)-(d) (1982)).

230. *Henderson*, 339 U.S. at 820. The actual procedural history of the case is somewhat more complex than the account provided in the text. This complexity accounts for the eight-year interval between the railroad's refusal to serve Henderson and the Supreme Court decision. The Commission initially held that Henderson's treatment had violated the statute but attributed the incident to the bad judgment of an employee. *Henderson v. Southern Ry.*, 258 I.C.C. 413, 419 (1944). A three-judge court set aside that ruling because the railroad's policy of reserving some tables exclusively for whites and others only conditionally for blacks resulted in unequal treatment of the races. The court remanded the matter to the Commission for further proceedings. *Henderson v. United States*, 63 F. Supp. 906, 916 (D. Md. 1945) (three-judge court). Meanwhile, the railroad had changed its policy to reserve one table exclusively for blacks. When occupied, however, that table was to be separated from the rest of the dining car by a drawn curtain; the railroad planned ultimately to install a five-foot partition to set off the black table. The Commission upheld this new policy. *Henderson v. Southern Ry.*, 269 I.C.C. 73 (1947). The three-judge court, over a dissent by Judge Morris Soper, affirmed. *Henderson v. ICC*, 80 F. Supp. 32 (D. Md. 1948) (three-judge court). The majority reasoned that the new policy satisfied the requirements of "separate but equal" because, based upon the racial composition of the railroad's passenger traffic, proportionately fair arrangements had been made for blacks and whites. *Id.* at 39. Judge Soper dismissed this point as irrelevant because the right to equal treatment applied to individuals rather than groups. Nothing in the new policy would assure Henderson of fair treatment in the same situation that gave rise to his complaint. *Id.* at 40, 42.

231. G. CROSS, *supra* note 20, at 65. McLaurin's precise age at the time is unclear. Marshall said he was 68. R. KLUGER, *supra* note 7, at 266. The president of the University of Oklahoma reports that he was 54. G. CROSS, *supra* note 20, at 85. However old he was, it was no accident that McLaurin rather than Ada Sipuel was selected to continue the challenge to segregated higher education in Oklahoma. Perhaps mindful of Justice McReynolds' dissent in *Gaines*, see *supra* notes 101-102 and accompanying text, Marshall believed that no one could plausibly claim that a man of McLaurin's age would be interested in intermarriage. R. KLUGER, *supra* note 7, at 266.

Entirely apart from that issue, there was a certain symmetry to the selection of McLaurin as the plaintiff. In 1923, his wife had been the first black to apply to the

applied to the graduate school of the University of Oklahoma early in 1948.<sup>232</sup> A study committee established by the regents of the university recommended that blacks be admitted to graduate and professional programs in white institutions.<sup>233</sup> The committee explained that creating new curricula for blacks in separate institutions could not be justified due to prohibitive cost and small projected demand.<sup>234</sup> Soon afterward, the legislature amended the segregation statutes to permit blacks to enroll in white colleges and universities to pursue programs not offered in black institutions. All instruction offered under this new law, however, was to be provided on a segregated basis. Pursuant to the statute, McLaurin was admitted but segregated within the university. At first he was required to sit in an anteroom adjoining his classrooms, at a designated desk in the library, and at a particular table in the cafeteria. Thereafter, he was assigned to a seat in a row of classroom desks set aside for nonwhites and to a desk on the main floor of the library. A three-judge district court rejected McLaurin's claim that these arrangements denied him equal protection.<sup>235</sup>

### B. *The Arguments*

By the time *Sweatt v. Painter* reached the Supreme Court, its import had become apparent. The State of Texas filed a 118-page brief in opposition to the petition for certiorari, while its brief on the merits ran 235 pages; both of these documents con-

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University of Oklahoma. Not surprisingly, she was rejected on racial grounds due to the state's segregation laws. Unfortunately, this was long before anyone seriously considered challenging such policies in court. G. CROSS, *supra* note 20, at 133.

232. G. CROSS, *supra* note 20, at 65-66.

233. *Id.* at 71-72, 75-77, 86-87.

234. Hubbell, *supra* note 109, at 375-76.

235. *McLaurin*, 339 U.S. at 639-40. The lower court, relying upon *Plessy*, held that it lacked authority to "obliterate social or racial distinctions which the State has traditionally recognized as a basis for classification for purposes of education" and that it had a duty "to honor the public policy of the State in matters relating to its internal social affairs." McLaurin was partaking of the same facilities as all other students at the University of Oklahoma. The conditions to which he had been subjected "rest[ed] upon a reasonable basis, having [their] foundation in the public policy of the State, and d[o] not therefore deprive [him] of the equal protection of the laws." Therefore, the court concluded in language reminiscent of *Plessy*, "we cannot find any justifiable legal basis for the mental discomfiture which the plaintiff says deprives him of equal educational facilities here." *McLaurin v. Oklahoma State Regents for Higher Educ.*, 87 F. Supp. 528, 530-31 (W.D. Okla. 1949) (three-judge court) (per curiam).

tained extensive appendices detailing federal and state judicial decisions upholding segregation and reprinting excerpts from reports questioning the wisdom of departing from the established pattern of race relations that had grown up in reliance upon *Plessy*. Eleven other states submitted an amicus curiae brief in support of Texas' position.<sup>236</sup> Six amicus briefs opposing segregation were also filed. In addition to the Solicitor General's memorandum on behalf of the United States, the most notable of these came from an ad hoc group known as the Committee of Law Teachers Against Segregation in Legal Education.<sup>237</sup>

1. *The NAACP Argument for Sweatt*.—Marshall made three principal points in his brief for Sweatt. First, applying traditional constitutional doctrine, he maintained that segregation lacked any rational purpose and hence was invalid. Because "there is no rational connection between racial differences and any valid legislative objective which a state may attempt to promote in providing public education," Marshall contended, "identical treatment of the races is mandatory."<sup>238</sup> The importance of education for the creation of an informed and responsible citizenry had prompted every state to take over from the private sector the principal burden of providing schools.<sup>239</sup> There was no basis for believing that the races differed in their intrinsic ability to earn.<sup>240</sup> Since education for democracy was designed to eliminate arbitrary distinctions and segregation imposed just such distinctions, segregation was incompatible with the basic concept of public schooling.<sup>241</sup> These considerations applied with even greater force to state-supported law schools.<sup>242</sup>

Not content to rest upon these philosophical considerations,

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236. See Brief of the States of Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Virginia, Amici Curiae [hereinafter cited as States Amicus Brief].

237. Other amicus briefs in support of Sweatt came from the American Federation of Teachers, the American Veterans Committee, the American Jewish Congress and other Jewish organizations, and the Texas Council of Negro Organizations.

238. Brief for Petitioner at 12.

239. *Id.* at 13.

240. *Id.* at 24.

241. *Id.* at 15, 19-21.

242. *Id.* at 16-19. The brief further argued that segregation cannot be justified as a means for preventing breaches of the peace. Even if protecting public order were a sufficient justification, however, the experience of other Southern and border states—and indeed of The University of Texas School of Medicine—which had admitted blacks

Marshall went on to point out that segregation damaged society at large. He suggested that segregation promoted interracial isolation, mistrust, and misunderstanding and inflicted a "badge of inferiority" upon the minority group. Education under these conditions would have a particularly serious impact upon a black lawyer, severely limiting the special contributions that he otherwise could make both to his clients and to the community as a whole. Since segregation offered society no benefits in return for the serious harms it imposed, the practice could not be justified.<sup>243</sup>

Second, he launched a careful but somewhat oblique attack on *Plessy*. He began by distinguishing the decision as dealing only with transportation, a field in which equality of separate facilities is much more readily assessed than in education, which implicates "psychological, sociological, and spiritual factors in addition to pure physical measurements."<sup>244</sup> He then argued that the difference in the procedural posture of the two cases—*Plessy* had come up for review of a judgment sustaining a demurrer, whereas this one followed a full trial at which the equality issue had been fully litigated—afforded yet another reason for closer scrutiny of Sweatt's claim.<sup>245</sup>

Marshall concluded this portion of his brief with two substantive jibes at *Plessy*. No subsequent decision of the Court had

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to formerly all-white universities had shown the fear of violence and discord to be illusory. *Id.* at 22-23.

The Texas experience involved a black medical student named Herman Barnett. The all-white University of Texas agreed contractually to provide graduate instruction to black Texas State University students when TSU could not provide such training. The Texas faculty taught the blacks outside the white campus, and the students earned Texas State credits. An exception was made for Barnett because the exorbitant cost of separate off-campus instruction made that alternative financially unfeasible. Instead, Barnett was permitted to study at the Galveston branch of The University of Texas. No problems of any kind resulted from this arrangement. See Report of the First Negro Student to Enter the Medical School, Texas Council Amicus Brief, *supra* note 115, App. C; O. JOHNSON, *supra* note 19, at 87.

243. Brief for Petitioner at 26-31.

Only after arguing that segregation could not survive even the traditional rationality review in this case did Marshall invoke more recent decisions applying more exacting scrutiny to racial classifications. Since the state had failed to demonstrate a compelling interest to justify its race-based refusal to admit Sweatt to The University of Texas, it had denied him the equal protection of the laws. *Id.* at 31-35.

244. *Id.* at 44. The brief does not explain what "spiritual factors" might be relevant to a determination of the equality of two educational institutions.

245. *Id.* at 45-46.

squarely upheld the extension of "separate but equal" to education, so "that case is not applicable to this problem."<sup>246</sup> Only at this point, and as a last resort, did Marshall urge the Court to overrule *Plessy*. He based this argument on a rather perfunctory review of the background of the fourteenth amendment.<sup>247</sup> More significantly, he presented statistics showing that whatever might be said for segregation in theory, as a factual matter, it had utterly failed to afford anything remotely approaching equal educational facilities for blacks. This suggested that "equality, within the meaning of the Fourteenth Amendment, can never be realized under a system of segregation."<sup>248</sup>

Finally, even if "separate but equal" were the appropriate legal standard, Texas had not provided and never could provide equality under segregation. The history and pattern of public expenditures for higher education in Texas showed that unlawful discrimination was inevitable so long as the state required that blacks and whites study apart from each other.<sup>249</sup> Most important, the two law schools were plainly not equal. Aside from Texas State's lack of accreditation, there was no comparison between the physical plant of the two institutions.<sup>250</sup> In addition, the black school, for all practical purposes, possessed no independent library, had absolutely no full-time faculty, and lacked the number of students required to staff a law review, moot court, and other facilities "which are essential to achieving the objectives of a modern law school."<sup>251</sup> Further, racial restrictions on enrollment would deprive black law students of the benefits of "mutual interchange of ideas and attitudes."<sup>252</sup>

2. *The Law Professors' Amicus Brief*.—The Committee of Law Teachers Against Segregation in Legal Education originated at Yale Law School, where Thomas I. Emerson and John P. Frank

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246. *Id.* at 51. Earlier, the brief distinguished *Cumming* (which was miscited as "*Cummings*"), *Berea College*, *Gong Lum*, *Gaines*, and *Sipuel* as cases in which the validity of segregation was either conceded or not litigated. *Id.* at 47-51.

247. *Id.* at 54-61.

248. *Id.* at 65.

249. *Id.* at 67-71. This portion of the brief relied heavily upon an analysis prepared for the trial by Dean Charles H. Thompson of Howard University. The trial judge, however, refused to consider this evidence in making his ruling. See *supra* note 214.

250. Brief for Petitioner at 71.

251. *Id.* at 73.

252. *Id.* at 74.



were members of the faculty. Both were friends of Thurgood Marshall; Frank previously had worked with him on other litigation.<sup>253</sup> A group of seven distinguished professors from six leading law schools drafted the brief; ultimately 188 signed it.<sup>254</sup> Their argument was simple: "[S]egregated legal education . . . violates the equal protection clause of the Fourteenth Amendment."<sup>255</sup>

The main points in the professors' brief did not differ materially from those which Sweatt's counsel presented, but their emphases contrasted sharply. Where Marshall finessed, the Law Teachers made a frontal attack on *Plessy* as the centerpiece of their argument. They first contended that Congress proposed the fourteenth amendment and passed numerous pieces of civil rights legislation during Reconstruction in order to outlaw all forms of segregation and discrimination against blacks.<sup>256</sup> Next, they claimed that the conceptual underpinnings of *Plessy*—that legislation could not overcome the innate differences and hostility between the races and that any attempt to do so would only exacerbate social conflict—had been disproven by intervening events.<sup>257</sup> Referring to the government's brief in *Henderson*, they observed that segregation had caused serious harm to blacks, demoralized whites, and generally aggravated "the grave maladjustments inherent in the system."<sup>258</sup> Moreover, their own analysis

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253. See R. KLUGER, *supra* note 7, at 275. Frank had met Marshall while he was teaching at Indiana University. Marshall went there to discuss a potential suit challenging discrimination in restaurants near the campus and other matters. The litigation was never filed because direct action by students and faculty led to the elimination of the objectionable practices. See Frank, *Can the Courts Erase the Color Line?*, 2 BUFF. L. REV. 28, 43 (1952).

254. Besides Emerson and Frank, the authors of the Brief of the Committee of Law Teachers Against Segregation in Legal Education as Amicus Curiae, *Sweatt v. Painter*, 339 U.S. 629 (1950) [hereinafter cited as Law Teachers Brief], included Alexander H. Frey of the University of Pennsylvania, Dean Erwin N. Griswold of Harvard Law School, Robert Hale of Columbia University, Dean Harold Havighurst of Northwestern University, and Edward H. Levi of the University of Chicago. The brief was reprinted a month before oral arguments in the *Minnesota Law Review*. See *Segregation and the Equal Protection Clause: Brief for the Committee of Law Teachers Against Segregation in Legal Education*, 34 MINN. L. REV. 289 (1950).

Only four of the signers came from the South, a fact which prompted one of the authors of the brief to characterize the endeavor as "a cheap virtue." Frank, *supra* note 253, at 31.

255. Law Teachers Brief, *supra* note 254, at 2, reprinted in 34 MINN. L. REV. at 290.

256. *Id.* at 4-22, reprinted in 34 MINN. L. REV. at 291-307.

257. *Id.* at 23-24, reprinted in 34 MINN. L. REV. at 307.

258. *Id.* at 31, reprinted in 34 MINN. L. REV. at 314.

of the effects of official policies relating to voting, education, housing, the military services, and employment confirmed that "elimination of patterns of segregation is not only feasible but is rapidly going forward under government sponsorship."<sup>259</sup> Thus, *Plessy* was neither good law nor sound logic and should be rejected.

Further, even if the "separate but equal" doctrine were consistent with the fourteenth amendment, that doctrine did not apply and should not be extended to education. This argument paralleled the position that Marshall had taken in his brief for Sweatt,<sup>260</sup> although the law professors added some nuances of their own. The *Plessy* Court, they observed, carefully stated that segregation must be reasonable.<sup>261</sup> The decision in *Buchanan v. Warley*,<sup>262</sup> which struck down a residential segregation ordinance, suggested that the validity of mandatory racial separation must be evaluated in each context. No prior education case had squarely addressed the issue. Thus, "if segregation in education is constitutional, it became so under a rule of law that came from no place."<sup>263</sup>

Applying the criterion announced in *Plessy* itself, the professors contended that segregation in education was unreasonable and hence unlawful. Not only did segregation impose grave harm upon its victims, but monitoring separate schools to assure the requisite equality was a quixotic exercise.<sup>264</sup> Moreover, segregated schools were inherently destructive of democratic values because they prevented students from getting to know and work with persons of other backgrounds and experiences.<sup>265</sup> Therefore, with the question squarely presented, the Court should refuse to extend the *Plessy* doctrine to public education.

Finally, they maintained that, even if *Plessy* had correctly applied the fourteenth amendment and even if segregation in education were reasonable at least in some circumstances, the two Texas law schools were inherently unequal. Thus, blacks never

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259. *Id.* at 29, reprinted in 34 MINN. L. REV. at 312.

260. See *supra* text accompanying note 244; compare Brief for Petitioner at 42-51.

261. 163 U.S. at 550; see *supra* note 48 and accompanying text.

262. 245 U.S. 60 (1917); see *supra* notes 74-75 & 79 and accompanying text.

263. Law Teachers Brief, *supra* note 254, at 35, reprinted in 34 MINN. L. REV. at 317.

264. *Id.* at 35, reprinted in 34 MINN. L. REV. at 317-18.

265. *Id.* at 36-38, reprinted in 34 MINN. L. REV. at 318-20.

could obtain the absolute educational parity to which they were entitled so long as the state obliged them to submit to segregated legal training. In short, they invoked the *Plessy* doctrine itself to argue that true equality in legal education was impossible in racially separate law schools.<sup>266</sup>

Relying upon points made at trial by Dean Harrison and Professor Sharp, the Law Teachers emphasized that the all-black Texas State law school was distinctly inferior to the all-white University of Texas law school on what they called purely mechanical factors, such as physical plant. But they insisted that the inequalities were even more pronounced due to "factors peculiar to legal education."<sup>267</sup> Their brief examined each of these factors in turn.

First, a small faculty cannot specialize and necessarily offer less diversity of viewpoints to students, even if each individual student may have greater access to each instructor. The projected four-person faculty at Texas State was inadequate in absolute terms to provide a first-class education and was vastly inferior to the twenty-eight-member instructional staff at Texas.<sup>268</sup>

Second, small law schools lack important inducements, including library and other resources, that might permit their faculty to develop national reputations and attract truly outstanding teachers and scholars from other institutions. The Texas faculty had many nationally prominent members, but it was "beyond belief that Texas [State could] at any time in the predictable future acquire the services of their equal."<sup>269</sup>

Third, small schools with small faculties necessarily must afford a narrower variety of courses than larger ones. Based upon the listings in the catalogues of the two institutions, Texas was offering approximately twice as many courses as Texas State.<sup>270</sup>

Fourth, the limited library holdings at Texas State in contrast to those at The University of Texas would significantly restrict

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266. *Id.* at 39, reprinted in 34 MINN. L. REV. at 320-21.

267. *Id.* at 40, reprinted in 34 MINN. L. REV. at 322.

268. *Id.* at 41, reprinted in 34 MINN. L. REV. at 322.

269. *Id.* at 42, reprinted in 34 MINN. L. REV. at 323. In any event, the professors added Texas State certainly could not attract similarly renowned professors before Sweat graduated.

270. *Id.* at 42 & n.100, reprinted in 34 MINN. L. REV. at 323 & n.100.

the quality of research and instruction available to students. It would cost approximately \$100,000 to equalize the basic collection of the two law schools, but there was no indication that the state was prepared to spend anywhere near that amount of money for the Texas State library.<sup>271</sup>

Fifth, the prestige of the institution and the prominence of its alumni significantly affect placement opportunities for its current students. Texas State, as a new school with no graduates and no reputation in the community when Sweatt sought to begin his legal studies, simply could not provide him with anything remotely similar to those available to him at "the old, established school."<sup>272</sup>

Sixth, very small schools cannot support a law review and its attendant intellectual and professional benefits. The law review at The University of Texas was "excellent," but there was no prospect for a similar journal at the much smaller Texas State law school "for lack of a sufficient number of topnotch students to man it."<sup>273</sup>

Seventh, a satisfactory moot court program requires a large enough enrollment to stimulate effective competition among students. The white school had such a pool of students upon which to draw for "satisfactory competitive groups," whereas the black school did not.<sup>274</sup>

Eighth, clinical programs also require enough advanced students to supervise beginners. There was an extensive legal aid program at Texas; it was unclear whether any similar program existed at Texas State except on paper.<sup>275</sup>

In short, the new law school which Texas had created under the pressure of litigation and to which it proposed to consign Heman Sweatt and all other prospective black attorneys was markedly inferior to the long-established and nationally promi-

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271. *Id.* at 42-43, reprinted in 34 MINN. L. REV. at 323-24. The professors defined equalization of the collections to mean that Texas State would have the same number of nonduplicate volumes as did Texas.

272. *Id.* at 43, reprinted in 34 MINN. L. REV. at 324 (footnote omitted). The disparity in placement opportunities was especially important since the assistant dean of the white law school had recently warned in an article in the *Texas Bar Journal* of an impending oversupply of lawyers in the state.

273. *Id.* at 43, reprinted in 34 MINN. L. REV. at 324.

274. *Id.* at 44, reprinted in 34 MINN. L. REV. at 324.

275. *Id.*, reprinted in 34 MINN. L. REV. at 325.

nent institution which was reserved for whites. Even if the "mechanical" aspects of the two schools were equal and the new one for blacks were able to overcome the less tangible disparities already mentioned, however, the professors contended that Texas State still would not be equal to The University of Texas. Inequality would exist because "the segregated plan misses the whole purpose of a modern law school."<sup>276</sup>

The crucial point was that lawyers must understand the communities and the society in which they practice. To this end, they need to learn their craft and exchange ideas with a representative group of future practitioners. On this score, the white school had significant advantages since it would contain a much broader cross-section of the population than would the black one. By limiting Texas State to blacks, the state was depriving Sweatt of the chance to exchange ideas "with a complete variety of fellow students."<sup>277</sup> This, in turn, would handicap him "in advising clients or in dealing with attorneys and judges who are a part of the broad stream of Texas jurisprudence deepened as a result of the years of group association at the [white] school."<sup>278</sup> Moreover, Texas State, by its size, could not attract enough good students or a sufficient diversity of viewpoints and experiences to make for a truly stimulating educational environment.<sup>279</sup>

The Law Teachers concluded their indictment of the state's approach as follows:

The inescapable inequality of Texas [State] lies in the fact that legal education is not a mere matter of cubic feet of classroom space, or the possession of a few thousand books, or the presence of four lawyers recently become teachers. If, instead, legal education is something alive and vital, if the measure is not cubic feet of air space but the intellectual atmosphere within the walls, if law teachers are appraised as individual men of varying degrees of talent, if education is in large part association, if research and practice are part of the job of legal training, if segregation in law school warps and corrupts the mind

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276. *Id.*

277. *Id.* at 45, reprinted in 34 MINN. L. REV. at 326.

Presumably, white students also would suffer from the inability to meet and work with blacks, although the brief does not explicitly discuss the effects of segregation on white students at this point. The failure to address this matter undoubtedly was not intended as a retreat from the professors' earlier argument concerning the adverse societal effects of racial discrimination. See *supra* text accompanying note 258.

278. Law Teachers Brief, *supra* note 254, at 46, reprinted in 34 MINN. L. REV. at 326.

279. *Id.*

and personality of man—if any of these things is true, then certainly *this Texas Negro institution is a mockery of legal education and of the equal protection of the laws.*<sup>280</sup>

3. *The State's Position.*—Texas argued simply that the constitutionality of segregation had long since been settled by an unbroken line of federal and state judicial decisions dating back over the previous century and that the lower courts in this case had correctly found the two law schools to be substantially equal.<sup>281</sup> After listing many of these decisions and reciting language that either expressly endorsed or pretermitted discussion of the compatibility of segregation with the fourteenth amendment, the state concluded that the prior cases “argue themselves” in support of the propriety of “separate but equal” educational institutions.<sup>282</sup>

280. *Id.* at 47, reprinted in 34 MINN. L. REV. at 327 (emphasis added).

281. The 11 states which supported Texas essentially endorsed its argument that the constitutionality of segregation had been conclusively resolved by *Plessy* and its progeny. They disclaimed any interest in the resolution of the factual question of the equality of the two law schools. States Amicus Brief, *supra* note 236, at 2. Instead, they emphasized that segregation laws in at least 17 states and the District of Columbia would be affected by the result of this case. *Id.* at 3-5. While conceding that “in some instances schools for Negroes [may] have fallen below the standards of schools maintained for whites,” they contended that “discrimination is not implicit in separate schools.” *Id.* at 5-6. Then, relying upon recent journalistic accounts of racial conflict in Northern and border communities, *id.* at 7-9, these states suggested that the elimination of segregation would engender widespread violence and the destruction of the public schools. *Id.* at 10-11.

Although Texas advanced some of the same arguments, it did so in a somewhat more subtle fashion. See *infra* note 287 and accompanying text. These states bluntly raised the prospect of intermarriage in language reminiscent of the Kentucky Court of Appeals in *Berea College* and implicit in Justice McReynolds' dissent in *Gaines*. See *supra* notes 64 & 101-102 and accompanying text. In order to put a somewhat better face on the point, these states suggested that opposition to social commingling existed among all races:

Experiences of the past have left marks that no laws or court decisions can erase overnight. It is a mistake for any “observer from afar” to assume that prejudice and fear against “crossing the line” in intimate social contact are limited to the Southern white man alone. They exist just as strongly in the average Negro man of the South. Negro men do not want their daughters, wives, and sweethearts dancing, dating, and playing with white men any more than white men want their women folk in intimate social contact with Negro men. “White trash” is the hated name which Southern Negroes apply to white men who keep the company of their women folk. Worse names are applied to Negro men who “cross the line.” The result in the South today is almost universal antipathy toward intimate mixed social relationships. The results of the disregard of these circumstances in the past have been tragic to both races, physically, socially, and politically.

States Amicus Brief, *supra* note 236, at 10.

282. Brief for Respondents at 42. The state listed all of the cases upholding the validity of segregated education in an appendix. *Id.* at 211-23.

Even if *Plessy* did not expressly control the case, the state made two arguments that its underlying principles applied as strongly to education as to transportation. First, there was ample evidence that the equal protection clause was not intended to prohibit segregated schools.<sup>283</sup> Second, and more significantly, it was apparent that this type of segregation was eminently reasonable.<sup>284</sup> In addition to the numerous prior cases supporting that conclusion, the state cited and discussed a variety of reports, including: (1) dissenting statements in the reports of the President's Commission on Higher Education and the President's Committee on Civil Rights, (2) the 1944 recommendation of the Bi-Racial Committee on Education for Negroes in Texas that a separate university for blacks be established, (3) the results of a Texas Poll showing overwhelming public endorsement of that recommendation in preference to desegregating The University of Texas,<sup>285</sup> and (4) the practice of the Federal Council of Churches which, despite the position of its amicus brief on behalf of Sweatt, permitted its members to maintain segregated congregations and educational institutions in the South.<sup>286</sup> Moreover, there was every reason to believe that desegregation would lead to serious breaches of the peace and a calamitous decline in popular support for the public schools.<sup>287</sup>

Finally, the state maintained that the lower courts' resolution

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283. *Id.* at 43-68.

284. *Id.* at 76-92.

285. The Texas Poll results showed overwhelming white and narrow black opposition to desegregating The University of Texas. A large majority of whites and a much smaller majority of blacks favored instead the creation of an entirely new and separate university for blacks. *Id.* at 86. The figures, however, were presented in a rather unhelpful format. The statistical table showed percentages of all respondents rather than of each racial group.

Further, the brief provides no information concerning the size or method of selection of the sample. Thus, there is no way to assess the reliability of the data. The results for blacks are likely to be especially questionable since they comprised only 14 percent of those surveyed. This would be the case even though black interviewers talked with black respondents in order to encourage those persons to voice their true attitudes. *Id.* at 86 n.99. The statistical margin of error for the small subset of black respondents is likely to be so large as to call into question the accuracy of the results, particularly if the total number of completed interviews was much below 1,000. For explanation of the mathematics involved, see H. BLALOCK, JR., *SOCIAL STATISTICS* 135-53 (1960); C. MOSER, *SURVEY METHODS IN SOCIAL INVESTIGATION* 115-21 (1958).

286. Brief for Respondents at 87-88.

287. In support of this argument, Texas cited the discussion of recent episodes of racial friction outside the South in the amicus brief of the states which endorsed its position. *Id.* at 93. Texas also alluded to the dread of social commingling between the

of the question of the equality of the two law schools could not be disturbed. Most fundamentally, Texas contended that this issue was not properly before the Court because Sweatt had not properly raised it in the Court of Civil Appeals.<sup>288</sup> Even if the Court determined to examine the matter for itself, the record established that Texas State in fact was substantially equal to Texas. To support this claim, the state reviewed the comparisons between the two institutions made at trial by Dean McCormick and Professor Walker, among others.<sup>289</sup> Moreover, since the original trial, the Texas State University for Negroes, including its law school, had opened in Houston. The interim law school in Austin had closed. The permanent law school had been provisionally accredited by the American Bar Association, and its first graduate had been admitted to the state bar. More than 2,000

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racers. It did so in a more restrained fashion than had the other states, but the point was unmistakably clear:

Undoubtedly one of the things which gives rise to the necessity for separation of the races is a historic antipathy of many of both races for a forced close personal, social contact. Beside the daily association in the classroom, at least some of which is social, universities and public schools officially maintain and sponsor extracurricular activities which do involve close personal social contacts. For example, there are school dances, rooms or halls for visiting, dancing, for playing various games, swimming, and so forth. Also connected with colleges are dormitories where the living together is on a more or less intimate plane.

*Id.* at 93-94 (footnote omitted).

288. *Id.* at 100-07. The Court of Civil Appeals, in denying Sweatt's petition for rehearing, said that its "jurisdiction in this latter regard was not invoked in this case." 210 S.W.2d at 448. The state based its argument upon this statement. Sweatt's counsel contended that they had not waived this claim of error in the lower court. See Petitioner's Reply Brief to Respondents' Brief in Opposition to Petition for Certiorari at 4-5.

The entire debate on this point may have been academic. The Court of Civil Appeals, after noting Sweatt's supposed procedural blunder, immediately went on to state: "However, we have carefully considered the evidence from that viewpoint . . . ; and were our jurisdiction in that regard properly invoked we would be constrained to hold that its preponderance and overwhelming weight support the trial court's judgment . . . ." 210 S.W.2d at 448. As the Supreme Court has explained in a series of habeas corpus cases, an area in which it has steadfastly refused to consider questions "which were not resolved on the merits in the state proceeding due to [a party's] failure to raise them there as required by state procedure," *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (emphasis deleted), there is no reason to apply the procedural default doctrine in situations in which the state court has addressed the merits of a claim notwithstanding any failure to comply with applicable state procedural requirements. *E.g.*, *Ulster County Court v. Allen*, 442 U.S. 140, 149, 152-54 (1979); *Francis v. Henderson*, 425 U.S. 536, 542 n.5 (1976). Since the Court of Civil Appeals affirmatively determined that the two law schools were equal, there was no reason for the Supreme Court to sidestep the issue.

289. Brief for Respondents at 107-19.



students were enrolled in the entirely new university.<sup>290</sup> Thus, the state obviously was acting in good faith to provide the best possible education to all of its students.<sup>291</sup>

### C. *The Position of the Federal Government*

The Truman administration played an important role in all three cases. The United States was a nominal defendant in *Henderson*.<sup>292</sup> In the district court, the Justice Department represented the ICC. When the case reached the Supreme Court, however, the Department refused to defend the Commission. Solicitor General Perlman filed a sixty-six-page brief that began by confessing error and concluded by calling upon the Court to repudiate *Plessy*.<sup>293</sup> This was the first time that the federal government had explicitly urged the abandonment of "separate but equal."<sup>294</sup>

In addition to acknowledging that the railroad's dining car regulations were unlawful, the administration brief forcibly argued that, contrary to *Plessy*, "legally-enforced racial segregation in and of itself constitutes a discrimination and inequality of treatment," irrespective of the physical equality of the separate facilities that might be provided.<sup>295</sup> Indeed, where segregation was officially sanctioned, "the phrase 'separate but equal' is a plain contradiction in terms."<sup>296</sup> Segregation of blacks was "uni-

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290. *Id.* at 120-22.

291. *Id.* at 119.

292. By statute, the United States must be a party to any action brought against the Interstate Commerce Commission. 28 U.S.C. § 2322 (1982).

293. After explaining the status of the United States as a statutory party, the brief stated:

Since the United States is of the view, however, that the order of the Interstate Commerce Commission [upholding the railroad's segregated dining car regulation] is invalid, this brief sets forth the grounds upon which it is submitted that the judgment of the district court is erroneous and should be reversed.

*Henderson* Brief, *supra* note 227, at 1-2.

294. Hutchinson, *supra* note 223, at 18. This was not, however, the first time that the Truman administration had urged the Court to reject segregation. In the restrictive covenant cases, *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Hurd v. Hodge*, 334 U.S. 24 (1948), Attorney General Clark and Solicitor General Perlman filed a 123-page amicus curiae brief on behalf of the United States. The first 47 pages of that brief described in detail the operation and deleterious effects of such covenants all over the country. For accounts of the administration's decision to file this brief, see R. KLUGER, *supra* note 7, at 252-53; C. VOSE, *CAUCASIANS ONLY* 168-74 (1959).

295. *Henderson* Brief, *supra* note 227, at 24.

296. *Id.* at 34-35.

versally understood as imposing on them a badge of inferiority. It 'brands the Negro with the mark of inferiority and asserts that he is not fit to associate with white people.'"<sup>297</sup> The physical separation of black diners from whites plainly was designed to emphasize their subordinate status.<sup>298</sup>

Nearly half of the administration brief was devoted to a vigorous attack on *Plessy*. The government contended that the nondiscrimination provisions of the Interstate Commerce Act rather than *Plessy* controlled the case. If "separate but equal" were relevant, then *Plessy* should be overruled since the legal and factual assumptions upon which it rested had long since been discredited.<sup>299</sup> In somewhat different terms than Marshall's argument in *Sweatt*, the government maintained that segregation caused substantial harm to the public interest. That practice limited opportunities for blacks, forced whites to engage in extensive hypocrisy to justify the practice, promoted mutual suspicion between the races, and held the country up to condemnation and ridicule in the international arena.<sup>300</sup> Thus, *Plessy* was "a constitutional

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297. *Id.* at 27-28 (footnotes omitted) (quoting PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 79 (1947)).

298. *Id.* at 28-32. The government argued that the statutory requirement of "substantial equality of treatment," *Mitchell v. United States*, 313 U.S. 80, 97 (1942), went well beyond the purely physical aspects of dining car service:

Manifestly, colored passengers would be discriminated against if the railroad's rules required its waiters to say, when serving them: "Don't think, because we have to serve you, that we believe you're as good as whites." The wrong would be compounded if a loud-speaking device carried these words to every diner in the car. But in substance, although the form may have been less offensive, these were the conditions under which the railroad furnished dining car service to [such] passengers.

*Henderson Brief*, *supra* note 227, at 31-32.

299. *Henderson Brief*, *supra* note 227, at 35-49.

According to the government, *Plessy* rested upon two dubious premises. One was that officially mandated segregation did not necessarily imply the inferiority of any group. That proposition was plainly incorrect as a matter of fact in 1950, whatever its accuracy may have been in 1896. *Id.* at 40-41 & n.35. The other was that the fourteenth amendment protected only civil and political rights but not social equality. The issue in this case, however, concerned travel for business; the right to "substantial equality of treatment," *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151, 161 (1914), therefore could not be dismissed as merely social. *Henderson Brief*, *supra* note 227, at 42-43.

300. *Henderson Brief*, *supra* note 227, at 49-64. With respect to blacks, the government maintained:

Segregation is a dominant factor in every aspect of the Negro's life. It limits his physical movements and economic opportunities, and adversely affects his personality and social development. It is much more than jim-crowism in vehicles and public places. It is an ostracism symbolizing inferiority which colors his thoughts and action at almost every moment.

anachronism which no longer deserves a place in our law."<sup>301</sup>

The government did not rest upon this extraordinary denunciation of *Plessy* and its insistence that segregation inflicted dignitary injury irrespective of the equality of the separate facilities. Attorney General McGrath underlined the administration's view by participating personally at oral argument in support of Henderson.<sup>302</sup> Moreover, the administration filed a memorandum as amicus curiae in *Sweatt* and *McLaurin*. Unlike the detailed substantive arguments in the *Henderson* brief, this memorandum was largely rhetorical. It began with the statement that "[t]hese cases . . . test the vitality and strength of the democratic ideals to which the United States is dedicated,"<sup>303</sup> then quoted extensively from *Strauder v. West Virginia*<sup>304</sup> and *Shelley v. Kraemer*,<sup>305</sup> and concluded, echoing the more extensive argument in the *Henderson* brief, that *Plessy* was "wrong as a matter of law, history, and policy" that should be repudiated "as an unwarranted deviation from the principle of equality under law."<sup>306</sup>

#### D. The Decision

The Court unanimously favored the civil rights claims in all three cases. The segregated dining car policy that caused Elmer

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*Id.* at 49-50 (footnote omitted). The brief supported this position with detailed references to a series of medical, psychological, and sociological studies of the deleterious effects of segregation on black physical and mental health. *Id.* at 49-55.

Whites suffer guilt and demoralization; the institution of segregation also "promote[s] the master race psychology, thus sowing the seeds for oppressive individual and collective action." *Id.* at 56.

As to the harm to the nation as a whole, the government cited another series of studies condemning segregation:

Experience and informed opinion are in agreement that normal contacts between the races diminish prejudice while enforced separation intensifies it. Race relations are improved by living together, working together, serving together, *going to school together*. The absence of a color line in . . . countries [such as Brazil] goes far to show that racial prejudice is not instinctive or hereditary, but is rather kept alive by man-made barriers such as segregation.

*Id.* at 57 (footnotes omitted) (emphasis added). This portion of the brief concluded by listing several recent occasions upon which foreign nations had condemned the United States for permitting segregation to exist within its borders. *Id.* at 60-63.

301. *Id.* at 65.

302. *Henderson*, 339 U.S. at 817, 822-23.

303. Memorandum for the United States as Amicus Curiae at 1-2, *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950), and *Sweatt v. Painter*, 339 U.S. 629 (1950) [hereinafter cited as Amicus Memorandum].

304. 100 U.S. 303 (1880).

305. 334 U.S. 1 (1948).

306. Amicus Memorandum, *supra* note 303, at 9-10.

Henderson to go hungry was "undue or unreasonable prejudice or disadvantage" prohibited by section 3(1) of the Interstate Commerce Act.<sup>307</sup> Since the policy plainly violated the statute, Justice Burton explained that there was no occasion to "reach the constitutional or other issues" suggested by the parties.<sup>308</sup> The state-imposed internal segregation to which George McLaurin had been subjected "impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and . . . to learn his profession."<sup>309</sup> The state effectively had deprived him of the chance "to secure acceptance by his fellow students on his own merits."<sup>310</sup> Thus, as Chief Justice Vinson put it, Oklahoma had denied him his "personal and present right to the equal protection of the laws."<sup>311</sup> Both opinions were muted in tone and narrow in substance; both suggested that these were relatively straightforward cases.<sup>312</sup>

The opinion in *Sweatt*, also written by Vinson, was similarly brief and to the point. It entirely avoided the constitutional arguments that the parties and amici had energetically pressed. The third sentence of the opinion read: "Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before [us]."<sup>313</sup> The balance of the decision focused upon whether the separate law schools were actually equal.

The Court emphasized the differences between the two institutions, but its analysis bore the unmistakable imprint of the Law Teachers' amicus brief. After comparing the mechanical aspects of the interim and permanent Texas State law schools with those

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307. *Henderson*, 339 U.S. at 824-26.

308. *Id.* at 826.

309. *McLaurin*, 339 U.S. at 641.

310. *Id.* at 642.

311. *Id.*

312. In fact, the Court had no difficulty agreeing upon the outcome in *Henderson* and *McLaurin*. Hutchinson, *supra* note 223, at 24-25. There were differences of view, however, as to precisely how to draft the opinions. Some members of the Court, notably Justice Douglas, wanted to use *Henderson* to overrule *Plessy*. Others, particularly Justice Frankfurter, wanted to avoid any premature resolution of the constitutionality of segregated education. In the interest of achieving unanimity, Chief Justice Vinson and Justice Burton accommodated most of their colleagues' suggested revisions. *Id.* at 26-29. They succeeded at least to the extent that no member of the Court wrote separately; Justice Douglas, however, concurred only in the result in *Henderson*. See *Henderson*, 339 U.S. at 826.

313. *Sweatt*, 339 U.S. at 631.

at The University of Texas, the Chief Justice concluded that the state had not provided substantial equality of educational opportunity for black and white law students.<sup>314</sup> Beyond the tangible differences, the white law school “possesse[d] to a far greater degree *those qualities which are incapable of objective measurement but which make for greatness in a law school*,” including faculty reputation, alumni influence, and institutional prestige and tradition.<sup>315</sup> No reasonable person who could choose freely between the two institutions “would consider the question close.”<sup>316</sup> Finally, the white school offered incomparable advantages:

Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit [Sweatt] excludes from its student body members of the racial groups which number 85% of the population of the State and includes most of the lawyers, witnesses, jurors, judges, and other officials with whom [he] will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered [Sweatt] is substantially equal to that which he would receive if admitted to the University of Texas Law School.<sup>317</sup>

The Court held that Sweatt had a “personal and present” right to “legal education equivalent to that offered by the State to students of other races.”<sup>318</sup> Because the separate law school did not afford him the quality of legal education provided in the all-white institution, “the Equal Protection Clause of the Fourteenth Amendment requires that [he] be admitted to the University of Texas Law School.”<sup>319</sup>

This terse holding cannot obscure the breathtakingly broad implications of the Court’s reasoning. “Separate but equal” presumably was still the law, but for the first time the “equal” com-

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314. *Id.* at 633-34.

315. *Id.* at 634 (emphasis added).

316. *Id.* The Chief Justice continued: “It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those” offered to Sweatt. *Id.* at 634-35.

317. *Id.* at 634.

318. *Id.* at 635.

319. *Id.* at 636.

ponent of the doctrine was given real bite. The Court refused to defer to whatever the state had provided in the name of equivalence. Moreover, it adopted a very expansive definition of equality. The Justices could have focused exclusively upon the physical or mechanical differences between the two law schools. These differences were obvious but they were not overwhelming. But the opinion goes well beyond such presumably objective factors to inquire into a broad range of qualitative matters which affect the evaluation of an institution. This was absolutely unprecedented. Never before had the Court examined the educational process in such detail.

Thus, the Court's refusal to reconsider the validity of *Plessy* at least in the context of graduate and professional education could not be taken as the last word on the subject. After *Sweatt*, it seemed that separate law schools could never be equal: if Texas State, which had been the beneficiary of an apparently sincere effort to create a respectable and fully accredited institution in the shortest possible time in the wealthiest state which enforced segregation, was constitutionally deficient, it was difficult to imagine any alternative that would pass muster. Any new program or institution for blacks would lack the history, tradition, prestige, and accreditation of any existing one for whites.<sup>320</sup>

In short, these rulings cast a long shadow over the "separate but equal" doctrine. *McLaurin* and *Henderson* made plain that blacks could not be excluded from public places unless separate facilities were provided for them. And *Sweatt* made clear that any separate facility would have to satisfy stringent criteria of equality. These decisions strongly implied that implementing truly equal segregated facilities would be enormously expensive, and perhaps impossible. The cases might be limited to their facts, but logically there seemed to be no limit to their potential for undermining segregation. Indeed, a week after the decisions

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320. It does not seem likely that another state could have fared more successfully than Texas did in this case. For example, an all-black law school began operations at the North Carolina College for Negroes shortly after the decision in *Gaines*. The state acted voluntarily and without any immediate threat of litigation. Nevertheless, a decade later the Court of Appeals for the Fourth Circuit, applying the analytical model adopted in *Sweatt*, held that this school was not equal to the all-white law school at the University of North Carolina. Accordingly, the court ordered four black applicants admitted to the latter institution, and the Supreme Court denied review. *McKissick v. Carmichael*, 187 F.2d 949 (4th Cir.), cert. denied, 341 U.S. 951 (1951).

were handed down, Thurgood Marshall wrote to one of his academic legal consultants that the opinions were "replete with road markings telling us where to go next."<sup>321</sup> It was, to be sure, a long practical step from universities to elementary schools, but now it was clear that the Court would have to face the issue. With the help of the "road markings" in the 1950 trilogy, the Justices might even be persuaded to jettison *Plessy* altogether. So the stage was set for *Brown*.

### E. Explaining the Decision

The lingering question about the *Sweatt* opinion is why the Court opted for such a broad definition of equality when a narrower one was available. One answer is that a narrower focus upon purely physical differences might not have produced so clear a result. In conference following oral argument, Chief Justice Vinson actually favored affirming the judgment of the state courts.<sup>322</sup> Although at least seven of his colleagues disagreed,<sup>323</sup> and he ultimately not only changed his mind but wrote the opinion, Vinson's initial reaction suggested that a restrictive notion of equality could promote endless debate. Other factors also may have pushed the Justices toward their final analysis. For example, well before the oral argument several members of the Court had thought carefully about the case.<sup>324</sup> Moreover, Justice Clark, an alumnus of The University of Texas law school, circulated a memorandum to his colleagues rejecting the state's position shortly after the argument.<sup>325</sup> The cumulative effects of the gov-

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321. Tushnet, *supra* note 17, at 433.

322. Hutchinson, *supra* note 223, at 24-25.

323. *Id.* at 24.

324. Justice Burton's clerks had provided him with three detailed memoranda on *Sweatt*, *McLaurin*, and *Henderson* at least ten days before the argument. Justice Clark, the recently appointed former Attorney General, also received a detailed memorandum from his clerk. Finally, William T. Coleman, Jr., clerk to Justice Frankfurter, provided an extensive analysis of the legal issues for his mentor. See Hutchinson, *supra* note 223, at 15-16, 19-21.

325. *Id.* at 21-22. Justice Clark's memorandum suggests that the Law Teachers' Brief profoundly influenced his thinking about the case. For an edited version of the Clark memorandum, see *id.* at 89-90. Justice Clark wrote in part:

[I]t is entirely possible that Negroes in segregated grammar schools . . . would receive skills in . . . elementary subjects equivalent to those of segregated white students, assuming equality in the texts, teachers, and facilities.

But it is obvious to me that the same would not apply to graduate schools. There are many reasons: (1) white schools have higher standing in the community as well as nationally, which means much to the graduate professional man;

ernment's confession of error and forceful condemnation of segregation in *Henderson* and the outrageous facts of *McLaurin* must have had some impact.

Ultimately, however, the Law Teachers' amicus brief seems to have shaped the Court's analysis. Because the Court declined to reach the constitutional issues which formed the centerpiece of their argument, one might minimize the influence of their brief. Such a view overlooks the reasoning of the unanimous opinion delivered by Chief Justice Vinson. This extraordinarily detailed and subtle analysis of the educational process had no analogue in the precedents. Both Justice Clark's memorandum and Sweatt's brief raised some of these issues, but not in detail.<sup>326</sup> Only the Law Teachers provided a systematic and sophisticated comparison of the two schools.

While it is impossible to determine the precise effect of the Law Teachers' submission, well-reasoned amicus briefs have played a substantial role in several leading cases.<sup>327</sup> There could

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(2) the older and larger college has more alumni, which gives the graduate more professional opportunities; (3) the larger and older school attracts better professors; (4) competition among schools is much keener in the older and more established school, thus affording a wider professional competition; (5) the larger and older institution attracts a cross section of the entire State in its student body—affords a wider exchange of ideas—and, in the combat of ideas, furnishes a greater variety of minds, backgrounds and opinions which is most important in the professions; (6) it takes years and years to establish a professional school of top rank, affording law reviews, competition, medals, societies, etc., which a Negro school would never attain; (7) acquaintance is important in the professions and segregation prevents it, thus depriving the Negro of many state-wide opportunities. These and other reasons are those which I am sure have led all but nine of the States to abandon the "separate but equal" doctrine at the graduate level.

*Id.* at 89-90.

326. See Hutchinson, *supra* note 223, at 89-90; *supra* note 325; Brief for Petitioner at 71-74. Most of the four pages in Sweatt's brief address differences in the physical plant and the faculty of the two schools. Most of the points which the Court discusses do not appear at all in Sweatt's brief.

327. Perhaps the two most graphic recent examples of the influence of amicus briefs on the decision of important lawsuits have come in the racial discrimination context. In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Court appointed William T. Coleman, Jr., to argue as amicus curiae in support of an Internal Revenue Service policy denying tax-exempt status to racially discriminatory private schools. *Id.* at 576; 456 U.S. 922 (1982). The Court acted after the Reagan administration reversed the long-standing federal position on this issue and urged that the case be dismissed as moot. For the background to the Coleman appointment, see 461 U.S. at 585 n.9; *The Supreme Court*, 1982 Term, 97 HARV. L. REV. 70, 262-63 n.15 (1983).

The other recent racial discrimination case in which an amicus brief played a significant role is *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978), in which at least 53 such briefs were submitted. *Id.* at 268 n.\*. Justice Powell's opinion for the Court



be no doubt of the quality of the work that went into this particular brief. Most of the historical materials were drawn from an article that had appeared in the *Columbia Law Review*,<sup>328</sup> and the elaborate comparisons of the two schools involved these eminent professors in the sorts of analyses of curricular, personnel, and administrative matters with which they were continuously concerned.<sup>329</sup> Although the record contained ample evidence sup-

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invalidating a preferential admissions program for minority applicants to the medical school of the University of California at Davis relied heavily upon a brief submitted on behalf of Columbia, Harvard, and Stanford Universities and the University of Pennsylvania in concluding that Davis could have adopted a more flexible approach similar to that used at Harvard College. *Id.* at 316-19 (opinion of Powell, J.) (citing Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae).

Cases arising in other contexts also reflect the influence of amici. In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Court extended the exclusionary rule to the states. This required the partial overruling of *Wolf v. Colorado*, 338 U.S. 25 (1949), something which the Court conceded had been urged upon it only by the American Civil Liberties Union as amicus curiae. 367 U.S. at 646 n.3. Surprisingly, the appellant had not even cited *Wolf*, and the amicus brief simply requested the overruling without detailed argumentation in support of that position. *Id.* at 674 n.5 (Harlan, J., dissenting).

In *Lambert v. California*, 355 U.S. 225 (1957), the Court invalidated an ordinance that made persons who had been convicted of certain offenses liable for misdemeanor prosecution if they failed to register with the police upon their arrival in Los Angeles. The amicus curiae brief of Warren M. Christopher, whom the Court had invited to participate on behalf of the appellant, 354 U.S. 936 (1957), apparently dominated the consideration and decision of the case. See Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 129.

In *McCollum*, *supra* notes 174-177 and accompanying text, Justice Frankfurter reportedly relied heavily upon an amicus brief submitted by the American Jewish Congress, the Synagogue Council of America, and other Jewish organizations. See Harper & Etherington, *Lobbyists Before the Court*, 101 U. PA. L. REV. 1172, 1174 (1953); Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 711 (1963).

328. See Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950). For a comparison of the use of the historical materials in the Law Teachers' Brief and in this article, see *infra* note 330.

329. A number of members of the Committee were active in the Association of American Law Schools, one of the principal accrediting agencies in the field of legal education. The Texas State law school received prompt approval from two other bodies, the American Association of Law Libraries and the American Bar Association, within a year of the opening of its permanent facilities in Houston. See O. JOHNSON, *supra* note 19, at 103-05, 108, 154. The AALS deferred action on the school's application for accreditation at its December 1949 meeting because of the pendency of the Supreme Court appeal in *Sweatt*. This deferral gave rise to widely conflicting interpretations. Compare Brief for Respondents at 121 (arguing that Texas State actually satisfied all AALS criteria for accreditation) with Supplement to Law Teachers Brief (contending that AALS had taken no position on Texas State's compliance with accreditation criteria). The dean of the black law school suggested that the interest of the Committee in ending segregation led those of its members who held influential positions in the AALS to seek improperly to prevent or delay his institution's accreditation. See O. JOHNSON, *supra* note 19, at 126-31.

porting the expansive conception of equality for which they argued, and while Sweatt's counsel could have devoted more attention to the point, the suggestions of the prestigious and presumably disinterested Law Teachers Committee undoubtedly appeared to have come from impartial observers.<sup>330</sup> That, in turn, may have made this approach more acceptable to at least some members of the Court.

Finally, larger historical developments and broader social changes may have made the Court more sensitive to the issues presented in the case. First, the case arose shortly after the end of World War II, in which the nation had defeated a regime based upon an unimaginably virulent strain of racism. Parties in a number of discrimination cases heard during this era made this

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330. The Law Teachers Committee may not in fact have been disinterested in the outcome. The group was created at the initiative of Sweatt's attorneys, who felt that sound strategic considerations dictated the tactic. See R. KLUGER, *supra* note 7, at 275. On the disinterestedness of professors in the public arena, see D. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* 167-205 (1968); J. WILSON, *THINKING ABOUT CRIME* 47-63 (1975).

The treatment of some of the historical materials in the Law Teachers Brief illustrates some of the perils of combining the writing of court papers and the writing of history. See generally Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 155-58. In their brief, the professors argued that Congress intended to outlaw segregation in education when it approved the fourteenth amendment. Law Teachers Brief, *supra* note 254, at 5-11, reprinted in 34 MINN. L. REV. at 292-97. The article which provided the basis for much of this part of the brief, however, concluded that there could be "substantial difference of opinion concerning the dominant intent of the reconstruction decade as to mixed schools." Frank & Munro, *supra* note 328, at 155; see also Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 59 (1955); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049, 1085-86 (1956). But cf. R. BERGER, *supra* note 10, at 117-33 (Congress plainly did not intend to prohibit separate schools). In fairness, however, it should be noted that the conclusions of the brief and the article do not differ meaningfully. Compare Law Teachers Brief, *supra* note 254, at 10-11, reprinted in 34 MINN. L. REV. at 296-97 ("we do not have complete evidence" of views of framers, but "dominant opinion" was that equal protection clause of fourteenth amendment eliminated all race-based legal distinctions), with Frank & Munro, *supra* note 328, at 162 ("it was accepted virtually unanimously" by supporters of fourteenth amendment that equal protection clause "forbade segregated schools").

Finally, the dean of the black law school implied that some members of the Committee improperly prevented the Association of American Law Schools from approving Texas State's application for accreditation in 1949. See *supra* note 329. This claim, of course, goes to the heart of the Committee's disinterestedness.

More recently, some black critics have charged that opponents of accrediting Texas State acted in bad faith because they did not challenge the credentials of The University of Texas and other white law schools. See, e.g., O. JOHNSON, *supra* note 19, at 134; Jones, *The Texas Southern University School of Law—The Beginning*, 4 TEX. S.U.L. REV. 197, 207 (1977).

point with greater or lesser degrees of subtlety.<sup>331</sup> The Court undoubtedly was aware of the acerbic criticism that greeted its wartime decisions upholding the internment of hundreds of thousands of Japanese-Americans.<sup>332</sup> Justice Jackson had been chief prosecutor at the Nuremberg war crimes trial, a role he described as "the most important, enduring, and constructive work of my life."<sup>333</sup> Thus, the Court as an institution was more aware than ever before of the inconsistency between racial discrimination and the American creed.<sup>334</sup>

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331. For example, the NAACP explicitly drew the connection between the fight against Nazism abroad and racism at home in a 1946 case that successfully challenged a state law requiring segregation on interstate as well as intrastate trains. The organization concluded its brief with the following observation:

Today we are just emerging from a war in which all of the people of the United States were joined in a death struggle against the apostles of racism. We have already recognized by solemn subscription to the Charter of the United Nations . . . our duty, along with our neighbors, to eschew racism in our national life and to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." How much clearer, therefore, must it be today . . . that the national business of interstate commerce is not to be disfigured by disruptive local practices bred of racial notions alien to our national ideals, and to the solemn undertakings of the community of civilized nations as well.

Brief for Appellant at 28, *Morgan v. Virginia*, 328 U.S. 373 (1946).

In the three 1950 cases, the federal government also emphasized that racial discrimination was inconsistent with basic American values and with the country's international obligations. Attorney General McGrath made this point at oral argument. 18 U.S.L.W. 3277 (1950). The government's written submissions developed this contention in greater detail. *Henderson* Brief, *supra* note 227, at 60-63; Amicus Memorandum, *supra* note 303, at 12-13.

332. The decisions were *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); and *Hirabayashi v. United States*, 320 U.S. 81 (1943). On the contemporary criticism, see, e.g., Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489 (1945).

Whatever the reason, the Court's decisions during the post-War period in cases involving claims of discrimination against Japanese-Americans certainly reflect greater sensitivity to the evils of race and nationality-based prejudice than did the war-time rulings. See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Oyama v. California*, 332 U.S. 633 (1948).

The Court also decided a number of other important racial discrimination cases favorably to civil rights claimants during these years. E.g., *Hurd v. Hodge*, 334 U.S. 24 (1948); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28 (1948); *Morgan v. Virginia*, 328 U.S. 373 (1946).

333. Shawcross, *Robert H. Jackson's Contributions During the Nuremberg Trial*, in MR. JUSTICE JACKSON: FOUR LECTURES IN HIS HONOR 87, 90 (1969); accord E. GERHART, *AMERICA'S ADVOCATE: ROBERT H. JACKSON* 228 (1958).

334. One other factor may have made the Court marginally more sensitive to the pernicious effects of racial discrimination. In 1947 Jackie Robinson became the first black major league baseball player in this century. He emerged as an immediate star. More significantly, his success paved the way for several other black players and may have helped to break down some forms of discrimination in public accommodations and

Moreover, the post-War years were a time of greatly increased public concern with education. President Truman established a Commission on Higher Education which, in five volumes of reports and recommendations, proposed a vastly expanded network of postsecondary institutions that would receive substantial financial support from the federal government.<sup>335</sup> Further, the GI Bill<sup>336</sup> enabled more than two million veterans to obtain higher education that many otherwise could not have afforded. Leading educators publicly stated that these students as a group were the most promising ever to attend American colleges and universities.<sup>337</sup> Below the college level, there was widespread apprehension that the nation's elementary and secondary schools faced serious shortages of money and staff. Thus, strong bipartisan support for federal aid to education emerged in Congress. In the spring of 1948, the Senate passed legislation providing such assistance for the first time in sixty years.<sup>338</sup> In other words, at the very time that *Sweatt* was pending before the Court, there was unprecedented popular concern with educational quality and with the benefits that the nation could realize from improvements in schooling at all levels. This broadly increased awareness may well have affected the Court's perception of the issues in the case, if only subconsciously.

None of these background factors can detract from the magnitude of the achievement of Thurgood Marshall and the other attorneys who represented Sweatt. As Pasteur was fond of saying in another context, "[C]hance favors only the prepared mind."<sup>339</sup> However propitious the circumstances may appear in retrospect, only superior lawyers who were willing to invest the necessary time and energy could have taken advantage of a favorable op-

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to improve racial attitudes among some whites. See J. TYGIEL, *BASEBALL'S GREAT EXPERIMENT* 343-44 (1983). It is impossible to assess the independent effect of this factor. In any event, such matters are not supposed to influence Supreme Court decisions. *But see* Flood v. Kuhn, 407 U.S. 258, 260-64 (1972).

335. See PRESIDENT'S COMMISSION ON HIGHER EDUCATION, *HIGHER EDUCATION FOR AMERICAN DEMOCRACY* (1948).

336. Servicemen's Readjustment Act of 1944, ch. 268, tit. II, 58 Stat. 284, 287-91.

337. See D. RAVITCH, *THE TROUBLED CRUSADE* 12-15 (1983).

338. The Senate bill ultimately was defeated in the House due to acrimony over the inclusion of religious schools as beneficiaries of federal largesse. That issue prevented the enactment of any similar program for years thereafter. See *id.* at 26-42.

339. R. DUBOS, *LOUIS PASTEUR: FREE LANCE OF SCIENCE* 101 (1960).

portunity. And as we have noted already, when the case began the circumstances seemed anything but promising.

## V. The Impact of the Decision

The immediate effects of the *Sweatt* decision were somewhat mixed. In the narrowest terms, the ruling involved only one plaintiff and one law school. It did not prevent further litigation over the desegregation of other state colleges in Texas.<sup>340</sup> Nor did its apparently unambiguous emphasis upon true equality keep other states from continuing vigorously to resist the admission of blacks to theretofore all-white institutions of higher learning. Perhaps the most egregious evasion involved Virgil Hawkins, who applied to the University of Florida law school in the spring of 1949 and gave up the effort after nine years of obstructionist maneuvers by state officials up to and including the governor.<sup>341</sup> Other states also desegregated their universities only under federal court order.<sup>342</sup> Violent resistance often accompanied the implementation of those orders.<sup>343</sup>

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340. See *Shipp v. White*, 5 Race Rel. L. Rep. 740 (N.D. Tex. 1960) (West Texas State College); *White v. Smith*, 1 Race Rel. L. Rep. 324 (W.D. Tex. 1955) (Texas Western College); *Atkins v. Matthews*, 1 Race Rel. L. Rep. 323 (E.D. Tex. 1955) (North Texas State College).

341. For the sordid details of this story, see Cooper, *Brown v. Board of Education and Virgil Darnell Hawkins: Twenty-Eight Years and Six Petitions to Justice*, 64 J. NEGRO HIST. 1 (1979); Paulson & Hawkes, *Desegregating the University of Florida Law School: Virgil Hawkins v. The Florida Board of Control*, 12 FLA. ST. U.L. REV. 59 (1984).

Cooper's title is somewhat misleading. The six petitions referred to there included only those Hawkins filed with the Supreme Court of Florida; he also submitted four to the Supreme Court of the United States. One of those resulted in an order that appeared to direct his admission. *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (per curiam). The state managed to place additional obstacles in his path, however, and Hawkins eventually took his degree at an out-of-state school. In November 1976, more than a quarter-century after he applied to the University of Florida, Virgil Hawkins became a member of the Florida bar.

342. See, e.g., *Gantt v. Clemson Agric. College*, 320 F.2d 611 (4th Cir. 1963); *Holmes v. Danner*, 191 F. Supp. 394 (M.D. Ga. 1961). The experiences of Hamilton Holmes and Charlayne Hunter, the first blacks to enroll at the University of Georgia, are described in C. TRILLIN, *supra* note 20. Holmes was elected to Phi Beta Kappa in his senior year. *Id.* at 179.

343. The most notorious episodes occurred in Alabama and Mississippi. In 1955 Autherine Lucy was admitted to the University of Alabama pursuant to a federal court order but was suspended and later expelled after riots broke out on campus. See *Lucy v. Adams*, 134 F. Supp. 235 (N.D. Ala.) (ordering Ms. Lucy's admission to the university), *aff'd per curiam*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956); *Lucy v. Adams*, 1 Race Rel. L. Rep. 323 (N.D. Ala. 1956) (ordering Ms. Lucy readmitted but refusing to hold defendants in contempt); 1 Race Rel. L. Rep. 456 (order of board of

Indeed, the decision in *Sweatt* did not even stop the practice of providing scholarships for blacks to pursue advanced training at out-of-state universities. That practice continued for nearly a generation after *Gaines* purportedly invalidated it in 1938. For example, Fred D. Gray, the current president of the National Bar Association, received his law degree in 1954 from Case Western Reserve University because his native Alabama preferred to give him a scholarship to study outside the state rather than provide any form of legal education for blacks within its own borders.<sup>344</sup> And as late as 1963, Georgia spent nearly \$450,000 on such out-of-state scholarships even after the University of Georgia had been desegregated by federal court order.<sup>345</sup>

But *Sweatt* had much more than nominal significance. As a practical matter, it greatly facilitated the demise of segregation in

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trustees expelling her because of "baseless, outrageous and unfounded charges of misconduct" against university officials); *Lucy v. Adams*, 2 Race Rel. L. Rep. 350 (N.D. Ala. 1957) (upholding expulsion order).

It took another court order and the deployment of federal troops nearly eight years later to enroll another black student in the university. See *Lucy v. Adams*, 224 F. Supp. 79 (N.D. Ala. 1965); *United States v. Wallace*, 218 F. Supp. 290 (N.D. Ala. 1963); Proclamation 3542, 3 C.F.R. 292 (1959-1963 Comp.); Exec. Order 11,111, 3 C.F.R. 771 (1959-1963 Comp.); Governor's Proclamation of June 11, 1963, 8 Race Rel. L. Rep. 457; Radio and Television Report to the American People on Civil Rights, PUBLIC PAPERS OF PRESIDENT JOHN F. KENNEDY 468 (1963).

Before James Meredith was enrolled at the University of Mississippi, the state's two highest elected officials were held in contempt of court, several thousand federal troops and U.S. marshals were deployed on campus, and two persons were killed in rioting. See *Meredith v. Fair*, 328 F.2d 532 (5th Cir. 1962) (en banc) (holding governor in contempt); *Meredith v. Fair*, 328 F.2d 534 (5th Cir. 1962) (en banc) (holding lieutenant governor in contempt). For an account of the entire episode by a member of the university's faculty, see J. SILVER, MISSISSIPPI: THE CLOSED SOCIETY 107-40 (1964). See also *Meredith v. Fair*, 328 F.2d 586, 588-89 (5th Cir. 1962) (en banc) (denying motion to dissolve temporary restraining order against state and university officials and to dismiss contempt citations); Proclamation 3497, 3 C.F.R. 2254 (1959-1963 Comp.); Exec. Order 11,053, 3 C.F.R. 645 (1959-1963 Comp.); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 140-41, 159 n.22 (1967) (describing events that gave rise to libel suit by retired Gen. Edwin Walker in connection with his appearance near campus at the time of disturbances).

344. *Two Bar Presidents*, IN BRIEF, Sept. 1985, at 9, 9 (alumni magazine of the Case Western Reserve University School of Law). The out-of-state scholarship program continued even after Gray graduated. See *Lucy v. Adams*, 134 F. Supp. 235, 238 (N.D. Ala.), *aff'd per curiam*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1956).

Gray returned to Alabama with his law degree and became a very successful civil rights lawyer whose efforts went a long way toward undermining segregation there. He argued successfully as lead co-counsel in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). His other clients have included Rosa Parks, Dr. Martin Luther King, Jr., the NAACP, freedom riders, sit-in demonstrators, and the students who desegregated the University of Alabama and the Macon County public schools.

345. C. TRILLIN, *supra* note 20, at 48-49.

universities and graduate and professional schools. By the fall of 1950, more than 1,000 blacks were attending classes in previously all-white institutions without noticeable incident.<sup>346</sup> More generally, *Sweatt* may have presaged closer judicial review of all educational issues. Since 1950, the Supreme Court has decided a wide array of cases dealing with academic matters. The results do not conform to any particular philosophical pattern, but they do share one common characteristic. Whatever the outcome on the merits, the Court generally has carefully and explicitly taken account of the special place of education in American society in considering whether the governmental regulation in question passes muster. This has been true in cases concerning the constitutional status of public education,<sup>347</sup> the first amendment rights of teachers,<sup>348</sup> the speech and associational rights of students,<sup>349</sup> control over curricular content,<sup>350</sup> policies for removing books from school libraries,<sup>351</sup> procedures for disciplining and removing students from the classroom,<sup>352</sup> and the liability of school officials for violations of students' rights.<sup>353</sup> One ought not overstate this point because the Court has never cited *Sweatt* outside the equal protection context. Nonetheless, the analysis of the educational issues in that case marked something of an intellectual Rubicon for the Court; after crossing it, the Justices may have found more careful analysis of such issues to be progressively easier.

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346. Ransmeier, *The Fourteenth Amendment and the "Separate but Equal" Doctrine*, 50 MICH. L. REV. 203, 240-41 (1951); Taylor, *The Demise of Race Distinctions in Graduate Education*, 1 DUKE B.J. 135, 150-52 (1951).

347. *Plyler v. Doe*, 457 U.S. 202, 221-23 (1982); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29-39 (1973).

348. *E.g.*, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Shelton v. Tucker*, 364 U.S. 479, 486-87 (1960); *Barenblatt v. United States*, 360 U.S. 109, 129-32 (1959); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality opinion); *id.* at 261-63 (Frankfurter, J., concurring in the result); *Slochower v. Board of Educ.*, 350 U.S. 551, 558-59 (1956).

349. *E.g.*, *Healy v. James*, 408 U.S. 169, 180-81, 185-94 (1972); *Tinker v. Des Moines Indep. Commun. School Dist.*, 393 U.S. 503, 506-07, 512-13 (1969).

350. *Epperson v. Arkansas*, 393 U.S. 97, 104-09 (1968).

351. *Board of Educ. v. Pico*, 457 U.S. 853, 864, 866, 868 (1982) (plurality opinion).

352. *Regents of the Univ. of Mich. v. Ewing*, 106 S. Ct., 507, 511-15 (1985) (substantive standard for academic dismissal); *Board of Curators v. Horowitz*, 435 U.S. 78, 84-91 (1978) (procedural standard for academic dismissal); *Ingraham v. Wright*, 430 U.S. 651, 660-63 (1977) (imposition of corporal punishment); *Goss v. Lopez*, 419 U.S. 565, 574-76, 580 (1975) (procedural standard for disciplinary suspension).

353. *Wood v. Strickland*, 420 U.S. 308, 318-22 (1975).

Ultimately, however, the significance of *Sweatt* should be assessed in the context in which it arose. The case was part of a concerted litigation strategy designed to overturn segregation. It was tried and argued on the theory that no separate black law school could possibly be equal to an all-white institution. Consequently, the Supreme Court decision dealt a crippling blow to "separate but equal" educational programs. Read literally, the ruling applied only to a pair of law schools. As a matter of logic, however, it seemed to contain no limiting principle. Viewed strictly in those terms, *Brown* seemed almost an a fortiori case in which the result flowed inexorably from that in *Sweatt*.

To appreciate the intimate logical connection between the two decisions, one must understand that *Sweatt* rested upon three central propositions. The first was that the intangible differences between the two law schools rendered them intrinsically unequal. The second was that race-based enrollment restrictions rendered the black school an academic vacuum which limited the interplay of ideas and the exchange of views. The third was that, whatever the official rationale, segregation constituted a formal statement that blacks were unworthy of full membership in the community. All of these propositions applied with great force not only to law schools, but at all levels of education. Thus, however narrowly the Court phrased its ruling, the result could plausibly be interpreted as the death knell of segregated schooling.<sup>354</sup>

The lawyers for the NAACP, however, correctly believed that

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354. Some contemporaneous commentators believed that *Sweatt* and *McLaurin* effectively had invalidated all forms of educational segregation. See, e.g., Note, *Equal Educational Facilities Under the Equal Protection Clause of the Fourteenth Amendment*, 1950 WASH. U.L.Q. 594, 615 (*Sweatt* "did in effect overrule [the *Plessy*] doctrine by implying that no constitutional equality can exist where one is compelled by state law to study in an 'academic vacuum'"); 3 ALA. L. REV. 181, 182 (1950) ("a careful reading of the cases indicates most decidedly that the attitude of the Court must be interpreted definitely to be that segregation is unconstitutional *per se*").

Others believed that the Court essentially had ended segregation at the graduate and professional level while leaving the way open to extend its ruling to colleges and ultimately to lower levels of the educational ladder. See, e.g., Hymän, *Segregation and the Fourteenth Amendment*, 4 VAND. L. REV. 555, 560-61 (1950); Roche, *Education, Segregation and the Supreme Court—A Political Analysis*, 99 U. PA. L. REV. 949, 952-53 (1951); Waite, *The Negro in the Supreme Court: Five Years More*, 35 MINN. L. REV. 625, 639 (1951); *The Supreme Court, 1949 Term*, 64 HARV. L. REV. 114, 130-31 (1950). Many regarded this extension as all but inevitable. See, e.g., Schwartz, *The Negro and the Law in the United States*, 14 MOD. L. REV. 446, 461 (1951); Note, *The Fall of an Unconstitutional Fiction—The "Separate but Equal" Doctrine*, 30 NEB. L. REV. 69, 82 (1951); 3 BAYLOR L. REV. 555, 559



the Court would not regard the constitutionality of segregation at the elementary and secondary level as so straightforward a matter.<sup>355</sup> The intangible factors which occupied so prominent a place in *Sweatt* seemed less important in the context of grade schools, while the number of persons directly affected by desegregation at that level was much larger. Accordingly, the lawyers refined and amplified the arguments that they introduced in *Sweatt* as the grade school cases made their way up to the Supreme Court. The expectation that these cases would prove more difficult was borne out in the event: the Justices struggled through two rounds of briefing and oral argument before reaching their unanimous decision in *Brown*.<sup>356</sup> In doing so, they accepted each of the propositions that formed the basis of *Sweatt*.<sup>357</sup> Therefore, they concluded that "[s]eparate educational facilities are inherently unequal,"<sup>358</sup> and that any system of state-imposed segregation necessarily violates the fourteenth amendment.<sup>359</sup> In a very real sense, then, *Sweatt* converted the demise of *Plessy* from a long-range dream to a substantial likelihood.<sup>360</sup>

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(1951); 39 GEO. L.J. 145, 148 (1950); 36 VA. L. REV. 797, 800 (1950); 8 WASH. & LEE L. REV. 54, 54 (1951).

A few commentators, mostly from the South, suggested that segregation might remain permissible below the college and university level, at least so long as the states made good faith efforts to equalize black schools. Significantly, several of these writers endorsed the Court's rulings; none criticized the decisions. See, e.g., Note, *Implications of Recent Cases on Education of Minority Racial Groups*, 3 U. FLA. L. REV. 358, 367 (1950); 2 MERCER L. REV. 272, 273 (1950); 5 MIAMI L.Q. 150, 152-53 (1950).

355. See R. KLUGER, *supra* note 7, at 284, 290-94; Frank, *supra* note 253, at 42.

356. *Brown v. Board of Educ.*, 347 U.S. 483, 488-89 (1954). See generally R. KLUGER, *supra* note 7, at 543-699.

357. *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954).

358. *Id.* at 495.

359. For the same reasons, segregation instituted by the federal government was held to violate the due process clause of the fifth amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

360. Although *Brown* ultimately resolved the constitutionality of segregation, *Sweatt* has retained independent significance. Most recently, for example, it was the principal authority upon which Justice Powell relied for the proposition that the goal of achieving a diverse student body is a permissible basis for educational institutions to consider race as one factor in determining which applicants to admit to their programs. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313-14 (1978) (opinion of Powell, J., announcing the judgment).

Interestingly, *Sweatt* is not mentioned in any of the opinions in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), a 5-to-4 decision in which the Court held that a state could not operate a nursing school for women only. It is at least possible that the analysis employed in *Sweatt* might have helped to clarify some of the questions at issue in *Hogan*.

## VI. Epilogue

Heman Marion Sweatt never became a lawyer. He entered The University of Texas pursuant to the Supreme Court decision vindicating his "personal and present" right to legal education.<sup>361</sup> Later on he dropped out, although he almost certainly would have graduated from Texas State.<sup>362</sup> That black college, its name changed to Texas Southern University,<sup>363</sup> has survived its clouded origins and attained modest academic respectability.<sup>364</sup> Its law school, despite repeated reports of its impending demise,<sup>365</sup> has produced the majority of black attorneys in the state.<sup>366</sup> Finally, in the ultimate irony of a case in which that quality abounds, in 1976 the institution that Sweatt refused to enter was renamed the Thurgood Marshall School of Law, in honor of a man who had spent the better part of four years as Sweatt's attorney trying to make sure that the infant institution would be stillborn.<sup>367</sup>

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361. 339 U.S. at 635.

362. See O. JOHNSON, *supra* note 19, at 173; L. MILLER, *supra* note 9, at 341; cf. *supra* notes 103-105 & 113-115 and accompanying text (concerning Lloyd Gaines and Ada Sipuel Fisher).

363. Act of April 20, 1951, ch. 65, § 1, 1951 Tex. Gen. Laws 109.

364. Texas Southern University is one of a handful of colleges "[a]t the head of the Negro academic procession . . . [which] would probably fall near the middle of the national academic procession." C. JENCKS & D. RIESMAN, *THE ACADEMIC REVOLUTION* 433 (Anchor ed. 1969).

365. See *id.* at 437; O. JOHNSON, *supra* note 19, at 175; cf. Frank, *supra* note 253, at 33 (because of prior discrimination, blacks admitted to white law schools have high rate of academic difficulty, in turn giving inadequate black schools continued vitality).

366. See Washington, *History and the Role of Black Law Schools*, 5 N.C. CENT. L.J. 158, 172 (1974); cf. King, *The Case for the Black Law School: The Texas Southern University Story*, 1 TEX. S.U. INTRA. L. REV. 73 (1970) (continuing need for black law schools).

367. See *Symposium*, 4 TEX. S.U.L. REV. 1 (1977).